Petition

Office-Supreme Court, U.S.
FILED
AUG 1 1981
ALEXANDER L. STEVAS,
CLERK

81-208
No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois Not-For-Profit Corporation,

Plaintiffs-Petitioners,

vs.

RICHARD SCHWEIKER, in his official capacity as SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES and THE BOARD OF COMMISSIONERS OF COOK COUNTY and THE COUNTY OF COOK,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. HARTE
111 West Washington Street
Chicago, Illinois 60602
(312) 726-5015
Counsel of Record

The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981.

NO. _____

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois Not-For-Profit Corporation,

Plaintiffs-Petitioners,

vs.

RICHARD SCHWEIKER, in his official capacity as SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES and THE BOARD OF COMMISSIONERS OF COOK COUNTY and THE COUNTY OF COOK,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above cause on April 21, 1981.

QUESTIONS PRESENTED FOR REVIEW.

1. Does a United States District Court have jurisdiction over claims that Federal officials, acting only in their official capacities, deprived plaintiff of its constitutionally protected property interests, and otherwise engaged in wrongful, tortious conduct?

2. Where the parties, without waiving any objections to jurisdiction, agreed to proceed to a trial limited to plaintiff's pendent state claims, and where the district court, after receiving evidence and considering the pleadings, found that plaintiff had stated a federal cause of action for deprivation of constitutionally protected property interests against State and Federal defendants, and held for the plaintiff on its state law claim, did the Court of Appeals, after examining the record and holding that plaintiff had no constitutionally pro-

tected property interests, err by requiring the district court to vacate its judgment for plaintiff and dismiss the plaintiff's action for lack of jurisdiction.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..2-3

TABLE OF CONTENTS 4

TABLE OF AUTHORITIES 5-8

CITATIONS TO OPINIONS BELOW 9

JURISDICTIONAL STATEMENT 10

CONSTITUTIONAL PROVISIONS AND STATUTES 11-17

STATEMENT OF THE CASE 18-29

ARGUMENT 30

CONCLUSION 55

APPENDIX .....App 1-54

TABLE OF AUTHORITIES

CASES

Page

Armand Schmoll, Inc. v. Federal Reserve Bank, 286 N.Y. 503, 37 N.E. 2d 225 (1941), cert. denied, 315 U.S. 818 (1942).....32,34

Brooks v. Dewar, 313 U.S. 354 (1941) 38

Carr v. Board of Trustees of University of Akron, 465 F. Supp. 886 (N.D. Ohio 1979) 48

Elliott v. Weinberger, 371 F. Supp. 960 (D. Haw. 1974) 31

Fox v. 34 Hillside Realy Corp., 87 N.Y.S. 2d 351 (Sup. Ct. 1949), aff'd mem., 276 App. Div. 994, 95 N.Y.S. 2d 598 (1950) 33-34

Gautreaux v. Romney, 448 F.2d 1114, (7th Cir. 1974) 43

Green v. Connally, 330 F. Supp. 1150 (D. D.C.), aff'd sub nom Coit v. Green, 404 U.S. 997 (1971) 43

Hagans v. Lavine, 415 U.S. 528 (1974) 53

Hudak v. Economic Research Analysts, Inc., 499 F.2d 996 (5th Cir. 1974) 49,51, 54

Page

In re Union National Bank & Trust Co. of Sanderton, Pa., 298 F. Supp. 422 (E.D. Pa. 1969).....42

Jackson v. Stinchcomb, 635 F. 2d 462 (5th Cir. 1981) 48

Larionoff v. United States, 533 F. 2d 1167 (D.C. Cir. 1976), aff'd 431 U.S. 864 (1977) 43

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) 48

Minnesota Public Interest Research Group v. Adams, 482 F. Supp. 170 (D. Minn. 1979) 31,32

Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969) 31

Parrent v. Midwest Rye Mills, 455 F.2d 123 (7th Cir. 1972).....54

Pennsylvania Turnpike Comm'n v. McGinnes, 179 F. Supp. 578 (E. D. Pa.), aff'd per curiam 278 F.2d 330 (3rd Cir. 1959), cert. denied 364 U.S. 820(1960)...34

Pennsylvania Turnpike Comm'n v. McGinnes, 268 F.2d 65 (3rd Cir.) reversing 169 F. Supp. 580 (E.D. Pa. 1958), cert. denied, 361 U.S. 829 (1959) 35

State of Arizona v. Cook Paint and Varnish Co., 541 F.2d 226 (9th Cir. 1976) 54

Page

State of North Dakota v. Merchant National Bank and Trust Co., 634 F.2d 368 (8th Cir. 1980) 31

T.A. Moynihan Properties, Inc. v. Lancaster Village Cooperative, Inc., 496 F. 2d 1114 (7th Cir. 1974) 43

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 27,42

Wheeldin . Wheeler, 373 U.S. 647 (1963) 36,37

Yanez v. Jones, 361 F. Supp. 701 (D. Utah 1973) 46

ARTICLES

Page

Arnold, The Power of State Courts to Enjoin Federal Officers, 73 YALE L.J. 1385 (1964 32

The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers 71 COLUM. L.R. 1474 (1971) 32

STATUTES

Page

Fifth Amendment, United States Constitution 42

Fourteenth Amendment, United States Constitution .....

28 United States Code, Section 1331. 43,45

28 United States Code, Section 1343. 40

42 United States Code, Section 1983. 46

Illinois Revised Statutes, Chapter 34, Section 5020 21

Illinois Revised Statutes, Chapter 34, Section 5020, as amended Public Act 81-1197, Section 10 21

CITATIONS TO OPINIONS BELOW.

The opinion in the United States District Court for the Northern District of Illinois, Eastern Division, dated October 20, 1980, granting judgment in favor of the plaintiff is not yet reported but is reprinted in the appendix to this Petition. (App. pp. 1-31).

The opinion of the United States Court of Appeals for the Seventh Circuit rendered on April 21, 1981 is not yet reported, but is reprinted in the appendix to this Petition. (App. pp. 32-53).

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 21, 1981. Plaintiff's petition for rehearing was denied on June 4, 1981. A copy of the Order denying said petition is reprinted in the Appendix (App. p. 54).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§1331, 1343, and the Court's pendent jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES.

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 UNITED STATES CODE, SECTION 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 UNITED STATES CODE, SECTION 1343:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation,

custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section-

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 UNITED STATES CODE, SECTION 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to besubjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ILLINOIS REVISED STATUTES, CHAPTER 34, SECTION 5020:

Duites and powers of Commission.

§10. The Commission, as agent to the county in which the Commission exists and without further authorization from that county or the Board of Commissioners thereof, shall have and exercise on behalf of that county, the following powers: to organize, operate, maintain and manage insofar as developing and enforcing broad policies, the various hospitals and hospital facilities owned by such county, and the hospital, medical, nursing, health and allied medical research and educational programs related to such hospitals and hospital facilities; to give its views, judgments or appraisals and/or to lend its good offices to offical state and local Comprehensive Health Planning Agencies, now existing or in the future created, with regard to projects for the implementation of comprehensive health care for all residents of

the County; to form agreements for the provision of needed health services with public or private nonprofit hospitals or health care facilities within the county, provided that such hospitals or health care facilities remain functionally autonomous but subject to the Commission's policies; to establish and enforce policies regarding the use, operation and management of hospitals and health facilities under its authority; to affiliate with one or more accredited medical or nursing schools. For the purposes of this Act, affiliation is defined as an agreement between a hospital or health facility and a medical or nursing school or schools, whereby the school or schools provide professional staff for the hospital or health facility, and the hospital or health facility provides an auxiliary teaching program for the school or schools, and such agreement conforms with the policies of the Commission; to make and enter into contracts to accomplish any or all of its purposes; to establish rules and regulations for the use, operation and management thereof; to fix, charge and collect reasonable fees and compensation for the use or occupancy of the various hospitals and facilities responsible to the Commission, or any part thereof, and for hospital, medical and nursing care, medicine

or other hospital or allied medical research or educational services furnished by any such hospital or facility; to establish bank accounts; to administer and expend all funds collected; and to borrow against and to pledge accounts receivable for purposes set forth in this Act. The Commission shall further have the power to accept, retain and administer any funds provided from any source for research and educational purposes related to services and programs administered by the Commission.

The Commission shall have the power to sue and be sued, complain and defend in its own name, as agent of the county, and to purchase, receive by gift, or otherwise acquire intangible and tangible personal property for its purposes. Judgments rendered against the Commission as agent for the county shall be payable solely from funds available to the Commission under Section 13 of this Act.

As agent for the county, the Commission shall fix all salaries, wages or other compensation, or benefits and working conditions of all employees, including physicians, or other persons performing services for the Commission.

ILLINOIS REVISED STATUTES, CHAPER 34, SECTION 5020, as amended PUBLIC ACT 81-1197, SECTION 10 (1979):

> The Board of Commissioners shall have and exercise all rights, powers and duties heretofore exercised by the Commission. All books, records, papers, documents, property, real and personal, unexpended appropriations and pending business in any way pertaining to the rights, powers and duties of the Commission shall be transferred and delivered to the Boar of Commissioners. All rights, duties and obligations of the Commission shall become the rights, duties and obligations of the Board of Commissioners.

STATEMENT OF THE CASE.

This action was commenced on January 3, 1981, when plaintiff, a not-for-profit corporation, filed a six-count Complaint against the then Secretary of the United States Department of Health, Education and Welfare ("HEW"), in her official capacity* and the State defendants, the Board of Commissioners of Cook County and the County of Cook (hereafter, collectively, the "County"). Essentially, plaintiff's Complaint alleges that the Federal and State defendants acted to deprive the plaintiff of its property interests, founded in a written

---

* When the Complaint was originally filed, it named as a defendant, Patricia Roberts Harris, in her official capacity, as Secretary of the Department of Health, Education and Welfare. The Complaint was subsequently amended to substitute Richard Schweiker, in his official capacity as Secretary of the Department of Health and Human Services.

agreement with the County, in the operation and eventual control of the Uptown People's Health Center without due process of law, in violation of rights secured by the Fifth and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. §1983. Plaintiff further alleges that the State defendants breached their contract with the plaintiff and breached their obligations of trust owed to the plaintiff arising out of their mutual relationship. The plaintiff further alleged that HEW, through its authorized agents, participated in this breach of trust. Jurisdiction was asserted under 28 U.S.C. §§1331, 1343, and the court's pendent jurisdiction.

Particularly, with respect to the federal defendant, plaintiff alleged that specific agents of HEW assisted the

State defendants' efforts to destroy the plaintiff; joined in breaches of trust; and, wrongfully withheld grant monies from the plaintiff.

The plaintiff Community Board is an Illinois not-for-profit corporation whose members consist of members and leaders of various community organizations, many of whom played a substantial role in the development of the Uptown People's Health Center (hereinafter the "Health Center"). The Health Center is an extensive primary ambulatory health facility located in the "Heart of Uptown" area of Chicago, Illinois. The instant law suit concerns the property rights which plaintiff alleges it has in the Health Center.

In September, 1978, the Plaintiff entered into an Agreement with the Cook County Health and Hospitals Governing

Commission (the "Commission") relating to the operation and control of the Health Center.* Under the Agreement, the Commission was to provide start-up monies with capital expenditures necessary for the operation of the Health Center, and to provide counseling in the management and administration of the Health Center. The Community Board was responsible for the billing and collecting at the Center. Most importantly, it was provided that when the Center eventually reached economic self-sufficiency, that is, when for any six month period the Health Center's revenue exceeded operating costs and the Community Board requested independence from the Commission, the

* The Commission was legislated out of existence in 1979, and by Statute the defendant Cook County Board of Commissioners assumed the Commission's rights, duties and obligations. Ill. Rev. Stat. ch. 34 §5020, as amended P.A. 81-1197 §10 (1979).

Health Center would become "an independent operation of the Uptown Community Board. . ."

Until this point of self-sufficiency was reached, it was agreed that the policy of the Health Center would be determined by a Joint Community Board-Commission Liaison Committee ("Joint Liaison Committee"), which consisted of five representatives from the Community Board and five from the Commission.

The Community Board also entered into an agreement with HEW under which HEW was to provide medical personnel at the Health Center in the Community Board's name, under the National Health Service Corps program, 42 U.S.C. §254d et. seq.

In late August or early September, 1978, the Health Center opened, staffed by County and NHSC personnel. After months of operation, the medical staff at the Health Center set out on a course

of conduct designed to oust plaintiff from the Center. To this end, they sought and received the assistance of HHS. This effort concluded with the executive director of the Commission "divorcing" the Community Board from the Health Center.

This prompted the filing of the instant action. Plaintiff's eighteen page Complaint detailed the relationship between the County, plaintiff and HEW. Further, plaintiff alleged specific conduct by the County and HEW which deprived plaintiff of what it perceived to be its Constitutionally protected property rights in the operation of, and eventual ownership of the Health Center.

Plaintiff alleged in considerable detail a continuing breach of trust by the County and a participation in that

breach of trust by Federal officials. Plaintiff further alleged a breach of contract by the County. Specific facts were alleged in support of all of these charges.

On February 1, 1980, District Court Judge Nicholas Bua referred this cause to the Community Relations Service ("CRS") of the United States Department of Justice. Representatives of HEW, the State defendants and plaintiff conferred at sessions of the CRS. On February 12, 1980, however, plaintiff, contending there was a possibility of either the Health Center closing or Federal funding being cut off, returned to the District Court and moved for an order preserving the status quo. This motion of plaintiff was granted by the district court, per Judge Marvin Aspen.

On February 22, 1980, the Federal and State defendants respectively moved the district court to dismiss the plaintiff's Complaint. Following briefing by the parties, these motions were denied on April 2, 1980.

Thereafter, the parties agreed, and the district court ordered, that the plaintiff and the State defendants would proceed to a trial limited to the issue of whether the written Agreement between these parties, which plaintiff alleged gave it constitutionally protected rights, was a contract and whether the State defendant had breached that contract.

A seven-day trial was held before the district court on an expedited basis at which sixteen witnesses testified and numerous documentary exhibits were admitted into evidence. Following these

proceedings, the district court entered judgment for plaintiff on August 12, 1980, and later on October 20, 1980, issued its Findings of Fact and Conclusions of Law. In its 30 page opinion, the district court analyzed the pleadings and evidence presented, and held that the plaintiff had stated a valid Federal cause of action under the Civil Rights Act, 42 U.S.C. §1983, against the State defendants, and had alleged a cause of action under the Fifth Amendment against the Federal defendants. Accordingly, the court could rule on the plaintiff's pendent state law claims.

On the merits, the district court found that the Agreement entered into between the plaintiff and State defendants was a contract and that the State defendant had breached that contract and breached the plaintiff's trust. The

district court, in finding that plaintiff had stated a cause of action under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments of the United States Constitution, and in finding for the plaintiff on the merits of its pendent state law claims, relied on the pleadings and specific evidence presented at trial.

Finding that the plaintiff's due process claims had sufficient substance to confer subject matter jurisdiction on the court and empower it to decide plaintiff's state law claims, see, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)*, the district court exercised its discretion and addressed the merits of the state law claims.

* In fact, the district court found that "... the plaintiff's federal claims are so substantial that they have nearly been proven at a hearing where the focus was not even on such claims." (App. p. 16).

Initially, the district court determined "that a valid and enforceable contract exists between the parties." (App. p. 25). The court then examined the pleadings and evidence relating to the County's breach of that contract and breach of the plaintiff's trust, and found for the plaintiff on the merits.

The district court then referred the parties back to the Community Relations Service to attempt to resolve their differences consistent with the court's findings. Once again, representatives of all defendants and the plaintiff convened.

On August 25, 1980, the State defendants filed a Notice of Appeal of the district court's judgment and on April 21, 1981 after oral argument, the Court of Appeals reversed the decision of the district court. The Court of

Appeals held that the written Agreement between the plaintiff and the State defendant did not vest in plaintiff any property rights protected by the Constitution, and that plaintiff had not stated a Federal cause of action against the Federal defendant. Accordingly, the Court of Appeals held, the district court could not exercise its pendent jurisdiction over the plaintiff's state claims. The Court of Appeals ordered that the district court dismiss the plaintiff's Complaint without prejudice to refile in the state court.

ARGUMENT.

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE UNSETTLED STATE OF THE LAW REGARDING STATE COURT AUTHORITY TO ENJOIN WRONGFUL CONDUCT OF FEDERAL OFFICIALS MAY LEAVE PLAINTIFF WITHOUT A REMEDY AGAINST THE FEDERAL DEFENDANTS.

The Court of Appeals reversed the decision of the district court and remanded "with directions to dismiss the Complaint without prejudice to the [plaintiff's] bringing the state claims alleged therein in state court, where they belong." (App.pp. 52-53.) Among these "state claims" are plaintiff's allegations that Federal officials participated in an egregious breach of trust with the State defendants. Plaintiffs sought an order enjoining such conduct.

There is, at the present time a great uncertainty among the judiciary as to whether a state court can enjoin the wrongful conduct of federal officials.

See e.g., State of North Dakota v. Merchant National Bank & Trust Co., 634 F. 2d 368 (8th Cir. 1980); Elliott v. Weinberger, 371 F. Supp. 960, 968 (D. Haw. 1974); Murray v. Vaughn, 300 F. Supp. 688, 695 (D. R.I. 1969). In Minnesota Public Interest Research Group v. Adams, 482 F. Supp. 170 (D. Minn. 1979), for example, plaintiff sought a preliminary injunction to enjoin Federal and State officials from proceeding with the construction of an interstate highway. Plaintiff's complaint alleged violations of federal and state law. Although the district court declined to decide the plaintiff's state law claims after dismissing the federal claims, because of the difficult questions of state law presented, the court observed:

> In the event the plaintiffs pursue their state law claims in state court against these defendants, the court is not unaware of the unsettled constitutional problems should a state court attempt to enjoin the "federal" defendants from proceeding with construction.

Id. at 182, n.4. Commentators, too, have recognized the unsettled state of the law in this area. See "The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Offices, 71 COLUM. L.R. 1474 (1971); Arnold, The Power of State Courts to Enjoin Federal Officers, 73 YALE L.J. 1385, 1397 (1964).

In a variety of contexts, state courts have denied their own power to enjoin federal officers. In Armand Schmoll, Inc. v. Federal Reserve Bank, 286 N.Y. 503, 37 N.E. 2d 225 (1941), cert. denied, 315 U.S. 818 (1942), for example, plain-

tiff brought suit in a state court to compel the Federal Reserve Bank of New York to perform a duty allegedly imposed by federal law. The New York Court of Appeals dismissed the suit for want of jurisdiction, stating that to allow state courts to control the manner in which a federal official performs a federal statutory duty would ignore the division between state and federal defendants. Similarly, in Fox v. 34 Hillside Realty Corp., 87 N.Y.S. 2d 351 (Sup. Ct. 1949), aff'd mem., 276 App. Div. 994, 95 N.Y.S. 2d 598 (1950), the New York court refused to adjudicate a tenant's claim that a maximum-rent order of the Federal Area Rent Control Director was invalid under the Housing and Rent Act of 1947.

The result of these decisions is that a plaintiff will often be left without any recourse against federal officials for allegedly wrongful conduct. In

Armand Schmoll, Inc. v. Federal Reserve Bank, supra, for example, the federal district courts at that time had no original mandamus jurisdiction, and the plaintiff was left remediless. In Fox v. 34 Hillside Realty Corp., supra, a federal district court had already refused to hear the case on the ground of lack of the then-required jurisdictional amount. 79 F. Supp. 832 (S.D. N.Y. 1948).

Pennsylvania Turnpike Comm'n. v. McGinnes, 179 F. Supp. 578 (E.D. Pa.), aff'd per curiam, 278 F.2d 330 (3rd Cir. 1959), cert. denied, 364 U.S. 820 (1960) is a classic example of the need for federal jurisdiction over claims seeking injunctive relief against Federal officials. In McGinnes, the plaintiff, which had alleged that it had been defrauded by a private developer, sought to enjoin the District Director of

Internal Revenue from paying to the developer as an overpayment of taxes those monies of which plaintiff had been defrauded. Suit was first brought in the federal district court, but it was dismissed for want of jurisdiction, the court finding that the case did not "arise under" federal law within the meaning of 28 U.S.C. §1331. Pennsylvania Turnpike Comm'n v. McGinnes, 268 F.2d 65 (3rd Cir.) reversing 169 F. Supp. 580 (E.D. Pa. 1958), cert. denied, 361 U.S. 829 (1959). The plaintiff then went to state court for the same relief. The federal defendant removed the case to the federal district court pursuant to 28 U.S.C. §1442(a)(1)(1958), and then successfully moved to dismiss for want of jurisdiction, invoking the rule that a federal court can acquire no jurisdiction on removal if the state court had

no jurisdiction to begin with. Plaintiff was left remediless.

In the instant case, plaintiff may now be precluded from seeking redress against the federal defendant as a result of the decision of the Seventh Circuit. This, despite the fact that plaintiff has alleged serious and wrongful conduct by this defendant which has greatly injured the plaintiff. As Justice Brennan observed, dissenting in Wheeldin v. Wheeler, 373 U.S. 647, 665 n. 13 (1963), ". . . it is unsettled whether the state courts have jurisdiction to entertain an action to enjoin a federal officer acting under color of federal law, . . . so that denial of federal court jurisdiction over claims such as petitioner's might leave an injured party totally remediless." (citations omitted).

Justice Brennan also recognized the strong public policy favoring federal jurisdiction over claims, such as plaintiff's, that federal officials have acted wrongfully:

> But where, as here, it is alleged that a federal officer acting under color of federal law has so abused his federal powers as to cause unjustifiable injury to a private person, I see no warrant for concluding that state law must be looked to as the sole basis for liability. Under such circumstances, no state interest is infringed by a generous construction of federal jurisdiction, and every consideration of practicality and justice argues for such a construction.

Id. at 66.

The instant case squarely poses the question of whether a federal district court has jurisdiction over claims of misuse of official power or otherwise wrongful conduct, by federal officials. This Court has recognized the issue as

one of "grave consequence," Brooks v. Dewar, 313 U.S. 354 (1941), and should use the instant case to resolve this important, but unsettled, question of federal law in favor of such jurisdiction. Wrongs such as those suffered by plaintiff should not go unredressed.

II. THE COURT OF APPEALS ACTION IN REVERSING THE DISTRICT COURT'S JUDGMENT FOR PLAINTIFF ON PLAINTIFF'S STATE LAW CLAIMS AND CALLING FOR THE DISMISSAL OF PLAINTIFF'S COMPLAINT AFTER A TRIAL WAS HELD ON SUCH CLAIMS AND AFTER THE DISTRICT COURT CONCLUDED THAT IT HAD SUBJECT MATTER JURISDICTION WAS A DRASTIC DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

As noted above, prior to the trial in this cause, the district court denied the motions to dismiss of the State and Federal defendants. An agreement was then reached, by all parties, that the plaintiff and the State defendants would proceed to a trial limited in scope to plaintiff's state law claims against the County.

Following the trial, the district court, in its findings of fact and conclusions of law again addressed the question of federal jurisdiction, explaining that "the development of the factual record at the hearing was such that rulings are now able to be made."

(App. p. 6).

The district court found that plaintiff had properly alleged an unconstitutional deprivation of property rights by the County, giving the court subject matter jurisdiction under 28 U.S.C. §1343. Plaintiff alleged that these property rights emanated from the written Agreement entered into between the plaintiff and the County. The district court agreed that the Agreement vested in plaintiff certain property rights protected from unlawful state interference. Plaintiff further alleged such unlawful interference by the State and Federal defendants, and introduced evidence at trial supporting its allegations.

In light of the nature of plaintiff's pleadings and the evidence at trial, the district court proceeded to rule on plaintiff's state law claims against the

County. The Court of Appeals for the Seventh Circuit, however, ruled that the district court had erred in concluding that plaintiff had stated a valid federal claim. The Appellate Court accordingly went on to hold that the district court was without power to adjudicate the plaintiff's state law claims, and ordered the reversal of the district court's judgment for plaintiff.

A. Plaintiff Alleged A Federal Cause of Action of Sufficent Substance to Invest in the District Court the Power to Decide Plaintiff's State Law Claims.

Where, as here, a party alleges claims arising under federal and state laws, a district court may exercise its pendent jurisdiction over the state law claims if:

> (t)he state and federal claims... derive from a common nucleus of oerative fact. But if, considered without regard to their federal or state character, a plaintiff's

> claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Federal claims are sufficient to provide the basis for pendent jurisdiction so long as such claims cannot be dismissed on the face of the pleadings along. In re Union National Bank & Trust Co. of Sanderton, Pa., 298 F. Supp. 422, 424, (E.D. Pa. 1969). Accordingly, it is the trial court which must determine, from the pleadings, whether it has the power to hear pendent state claims. In the instant case, of course, the district court resolved this question in favor of jurisdiction.

Plaintiff's Complaint states a valid cause of action against the federal defendant under the Fifth Amendment to the

United States Constitution, which provides that no person shall be deprived of property without due process of law. Contractual rights are among the many property interests protected under this Amendment. See, e.g., Larionoff v. United States, 533 F.2d 1167, 1179 (D.C. Cir. 1976), aff'd 431 U.S. 864; T.A. Moynihan Properties, Inc. v. Lancaster Village Cooperative, Inc, 496 F. 2d 1114, 1118 (7th Cir. 1974). The court has jurisdiction over a claim alleging that official conduct has violated the Fifth Amendment under 28 U.S.C. sec. 1331. Gautreaux v. Romney, 448 F.2d 721, 734 (th Cir. 1971) and the power to correct improper action of federal officials which fails to observe constitutional limits. Green v. Connally, 330 F. Supp. 1150, 1172 (D.D.C), aff'd sub nom Coit v. Green, 404 U.S. 997 (1971).

In the instant case, the federal defendant has participated with the County defendants in an unconstitutional deprivation of plaintiff's property. The district court had jurisdiction over such a claim.

Plaintiff's Complaint describes in considerable detail the efforts of the federal defendants to interfere with plaintiff's property interests. For example, paragraph 34 of the Complaint states:

> However, these HEW representatives have failed to fulfill these obligations. In particular, Dr. Robert Bowser, designated by HEW (National Health Service) to act as Clinical Coordinator to assist NHSC personnel assigned to the Center to better perform pursuant to the NHSC grant, has aligned himself with Commission personnel and has supported the efforts of Shansky, Kuttner and other Commission personnel to destroy the plaintiff Community Board. HEW personnel have attended meetings of persons invited together by Shansky, Kuttner and others who wrongfully desire to

replace the plaintiff Community Board and have thereby wrongfully given an appearance of legitimacy to the conduct of Shansky,Kuttner and others. HEW representatives have met in private with Shansky, Kuttner and other staff members of the Health Center and the Commission(now Board of Commissioners employees) with knowledge that those Commission personnel are acting in breach of the Agreement and their fiduciary duties to the Community Board. They have excluded Community Board members from these meetings and have withheld approval of the Community Board's Urban Health initiative grant but have failed to work meaningfully with the Community Board to aid in the resolution of the subject controversy.

Furthermore, the Federal defendant threatened to terminate its grants to plaintiff though its authority to do so was narrowly limited by the applicable regulations found at 45 C.F.R. sec. 74.115. Where a federally protected right created by Federal regulations is jeopardized, 28 U.S.C. sec. 1331, provides the aggrieved party with a

Federal Forum. See Yanez v. Jones, 361 F. Supp. 701, 706 (D. Utah 1973).

The federal claims under 42 U.S.C. sec. 1983 against the County discussed more fully, supra, similarly provide a basis for the district court's exercise of its pendent jurisdiction. Without going into great detail regarding the substance of those claims, suffice it to say that plaintiff alleged:

1. That the Agreement between plaintiff and the County vested in plaintiff certain constitutionally protected property rights.

2. That County agents refused to follow the term of the Agreement between the County and plaintiff.

3. That County agents secretly attempted to destroy plaintiff's relationship with HEW.

4. That County agents secretly conspired to destroy plaintiff.

5. That County agents did improperly sever the plaintiff's relationship with the County and with the Health Center without due process of law and in viola-

tion of state law and the terms of the Agreement.

6. That all of the above actions were approved and adopted by the County.

B. The Appellate Court Confused the Jurisdictional Question with the Merits of Plaintiff's Claims.

As noted above, all that must be shown to empower the district court to exercise jurisdiction over plaintiff's state claims is that plaintiff properly pleaded a recognized federal cause of action. The Seventh Circuit, in reversing the district court, however, relied on its reading of the Agreement between the parties and held that the district court could not exercise its pendent jurisdiction because the Agreement did not vest any constitutionally protected rights in plaintiff. This in no way justified the reversal of the district courts judgment on plaintiff's state law claims.

The Fifth Circuit Court of Appeals has set out the significance, or more accurately, the insignificance, of a finding against plaintiff on the merits of its federal claim:

> Federal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right. If his claim is bad, then judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not give the right the party claims, it is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction. Dismissal for want of jurisdiction is appropriate only if the federal claim is frivolous or a mere matter of form.

Mindes v. Seaman, 453 F.2d 197, 198, (5th Cir. 1971) (emphasis added) (citations omitted). See also Jackson v. Stinchcomb, 635 F.2d 462, 471 (5th Cir. 1981).

In Carr v. Board of Trustees of University of Akron, 465 F.2 Supp. 886 (N.D. Ohio 1979), for example, a non-tenured professor who was terminated from his

employment brought an action in the United States District Court, claiming that the termination denied him due process of law and also was a breach of his employment contract. The district court on the merits found that the plaintiff had no protected property interest. Nevertheless, the Court exercised its discretion and elected to, "in the interests of justice and judicial economy. . . exercise pendant(sic) jurisdiction over plaintiff's state law claim" Id. at 903.

Plaintiff has argued, supra, that its Complaint stated a valid cause of action, as so held by the district court. Even if the district court was wrong, however, on the merits of plaintiff's federal claim, the fact that these claims were not totally frivolous gave the court jurisdiction over the state law claims. In Hudak v. Economic Research Analysts,

Inc., 499 F.2d 996 (5th Cir. 1974), for example, plaintiff brought an action in the district court under the Securities Exchange Act of 1934, 15 U.S.C. secs. 78 (b), 78 t(a), and under state common law. The district court exercised its pendant jurisdiction to decide the state law claims, after determining that plaintiff had stated a cause of action under federal law.

The Fifth Circuit, on appeal, found that the plaintiff's federal cause of action was barred by the applicable statute of limitations. The appellate court then addressed the question of "whether having determined that the federal claim ought to have been dismissed at the outset, we should proceed to review the holding on the pendent state claim or remand that count to the district court with directions to dismiss

for want of jurisdiction." 499 F.2d at 1001. This was, essentially, the same issue faced by the Court of Appeals in the instant case. The Fifth Circuit, however, unlike the Seventh Circuit here, recognized the existence of the district court's pendent jurisdiction:

> In light of its plausible, though erroneous, conclusion that the federal cause of action was not barred by the applicable statute of limitations, the court below was unquestionably justified in considering the [state law claims].

Id.

In the instant case, the Seventh Circuit erroneously concluded that because it disagreed with the district court's analysis of plaintiff's constitutional rights, the district court had no authority to consider plaintiff's state law claims. As seen from the above discussion, this is contrary to the law of other federal jurisdictions.

C. Under the Circumstances of the Instant Case, the Seventh Circuit's Order that the Judgment of the District Court be Reversed and that Plaintiff's Claims be Dismissed Was Particularly Egregious.

As discussed above, after the district court denied the motions to dismiss of the State and Federal defendants, it was agreed by all the parties to this action that the plaintiff and the County would proceed to a trial limited in scope to the plaintiff's state law claims. Subsequently, a trial was held at which testimony was heard over seven days. Sixteen witnesses testified and fourteen additional witnesses submitted their testimony in the form of written stipulations. Numerous exhibits were offered by both parties and received into evidence.

All of the parties to this action have expended considerable time and money in framing the issues and arguing

their respective positions. Three different district court judges have dealt with various requests for relief by the plaintiff and all three have granted plaintiff the relief requested. All of these factors mandate that the decision of the Court of Appeals be reversed.

If plaintiff were to have to refile its action in the state court, there would be an enormous waste of judicial resources. This is a relevant consideration in determining the pendent jurisdiction of the district court.

This Court has encouraged the use of pendent jurisdiction, where warranted by the "advantages of economy and convenience." Hagans v. Lavine, 415 U.S. 528, 546 (1974). The inconvenience and expense involved in retrying those issues already ruled on by the district

court are strong arguments for the allowance of the district court's judgment to stand. See Hudak v. Economic Research Analysis, Inc., 499 F.2d 996, 1001 (5th Cir. 1974), citing Parrent v. Midwest Rye Mills,, 455 F.2d 123 (7th Cir. 1972). The Seventh Circuit's decision disallowing the district court's exercise of its discretion flies in the face of these, and other decisions. See State of Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir. 1976) (holding that it was not an abuse of discretion for the district court to refuse to vacate its judgment on plaintiff's state law claims where the court and the parties had expended considerable time on those claims before the plaintiff's federal claims were dismissed.)

CONCLUSION.

For that reason stated above, this petition should be granted since it presents questions of vital public interest which have not been settled by this Court. These questions, if left undecided, could leave injured parties without any means of redress. In the instant case, the refusal of this Court to decide these issues would also result in an extraordinary waste of judicial and private resources.

Respectfully submitted,

WILLIAM J. HARTE
Attorney for Plaintiff-Petitioner
111 W. Washington Street
Chicago, IL. 60602
(312) 726-5015

JAMES P. CHAPMAN
ROBERT J. ZAIDEMAN
33 N. Dearborn Street
Chicago, IL. 60602
(312) 263-0789

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois not-for-profit corporation,	)	
Plaintiff,	)	
vs.	)	No. 80 C 0032
PATRICIA ROBERTS HARRIS, in her official capacity as Secretary of the Department of Health, Education, and Welfare of the United States; THE BOARD OF COMMISSIONERS OF COOK COUNTY, a Municipal corporation; and THE COUNTY OF COOK, a Municipal corporation	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court having heard the testimony of witnesses, having read and considered exhibits received into evidence, having heard the arguments of counsel and considered the memoranda filed in this matter, hereby enters its findings. 1/

1/ On August 12, 1980, judgment was entered in favor of the plaintiff declaring the Agreement between the parties to be valid, enforceable and binding upon the defendants. The defendants were ordered restrained from interfering with the lawful contractual rights of the plaintiff. The court also made the following statement: "Because of the necessity of a speedy resolution to this dispute, the findings that would normally accompany this Judgment Order and Decree shall be entered in the near future. They shall be wholly consistent with this order." This order constitutes those findings.

I. INTRODUCTION

The plaintiff organization, Uptown People's Community Health Services Board of Directors (hereinafter "Board") is a duly registered not-for-profit corporation. The defendant County of Cook, Illinois (hereinafter "County") 2/ is a unit of local government and a body politic. The defendant Board of Commissioners of Cook County, Illinois is the legislative arm of the County. The Health and Hospitals Governing Commission (hereinafter "Commission") was a legislatively created entity established to provide certain health care services in the County. The Commission was created in 1969 and was legislated out of existence as of December 1, 1979. Defendant Patricia Roberts Harris, sued as the Secretary of Health, Education, and Welfare (hereinafter "HEW"), is a named defendant who appeared and filed responsive pleadings to the complaint but did not participate in the hearing before the court.

The Commission oversaw the provision of health care at Cook County Hospital, Oak Forest Hospital, Cermak Memorial Hospital, and various out-patient clinics in Cook County, Ilinois. Beginning sometime in early 1977, persons from the Uptown community of Chicago began to meet with officials from the Commission to discuss the possibility of opening an out-patient medical clinic in the Uptown area. On January 20, 1978, the Board was established. In preparation for applying for a National Health Service Corp.

2/ Throughout this order, when the court refers to the "County", it is referring to both the County of Cook and the Board of Commissioners of Cook County unless otherwise noted.

(NHSC) assignment of medical personnel from HEW, the Board performed a survey in order to establish that the Uptown area was a medically underserved area as defined by HEW regulations.

On February 19, 1978, the Board, as applicant, filed an application for NHSC personnel. The drafting of the application appears to have been a joint effort by the Board and Commission personnel. Before HEW would approve an NHSC assignment of personnel, its regulations required that the Board and the Commission enter into either a written agreement of understanding or a contract. HEW subsequently approved the application, contingent on the Board reaching an agreement with the Commission for the establishment of the facility in Uptown.

In September, 1978, the Board and the Commission entered into a written agreement (hereinafter "Agreement") relating to the operation of the facility, named the Uptown People's Health Center (hereinafter "Center"). Pursuant to the Agreement, the Commission was to provide to the Board start-up monies for capital expenditures and other expenses necessary for the operation of the Center and counsel in the management and administration of the Center as a health facility. A substantial portion of the cost of operating the Center was borne by the NHSC grant. Professional staff were to be provided by both the Commission and HEW.

Under the Agreement, the Board and the Commission created a "Joint Community Board Commission Liaison Committee" (the "Liaison Committee") comprised of five representatives of the Board and five representatives from the Commission. The Liaison

Committee was assigned responsibility for all the major policy decisions governing the Center and its staff. Liaison Committee decisions, however, were subject to approval by both the Community Board and the Commission before implementation. This relationship, under the terms of the Agreement, was to continue in force until the time when the Center reached economic self-sufficiency, and the Board requested complete independence from the Commission in the operation of the Center.

Plaintiff, on January 3, 1980, filed its six-count complaint in this action. The plaintiff is seeking a declaratory judgment finding the Agreement valid and binding and an order enjoining the conduct of those persons who would "destroy that agreement and appropriate for their own use the subject matter of that Agreement, namely, the Center." Jurisdiction was invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. §§ 2201, 2202, 42 U.S.C. §§ 1983, 1985(3), and the Fifth and Fourteenth Amendments to the United States Constitution.

Plaintiff charged both of the County defendants with (1) violations of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985(3) (Count II); (2) a breach of the agreement between the Community Board and the Commissioners (Count III); (3) a breach of trust obligations owed to the Community Board (Count IV); (4) a violation of Article I § 10 of the U. S. Constitution (Count V); and (5) a violation of Article I § 2 of the Illinois Constitution of 1970 (Count VI). Plaintiff charged the

federal defendant with (1) violations of various statutes, regulations, rules and guidelines governing HEW's administration of the NHSC Program (Count I); and (2) violations of the Fifth Amendment (Count II).

The County defendants filed a motion to dismiss on the grounds that 1) the complaint fails to state a claim upon which relief may be granted; 2) no enforceable contract exists; 3) that the Health and Hospitals Governing Commission terminated the agreement in question for good cause; 4) that by December 1, 1979 when Cook County took over the operation of the Health and Hospitals Governing Commission, the agreement in question had already been dissolved; 5) that Cook County and the Board of Commissioners have unfettered discretion in funding and refusing to fund projects with tax monies; 6) that the County defendants are immune from suit as they have acted in their legislative capacity; 7) that no federal claim has been established against the County defendants; 8) that plaintiffs by their actions of using the facilities for their personal benefit have violated their fiduciary duty to defendants thus entitling defendant to terminate the agreement for good cause; 9) that the allegations of the wrongful acts by defendants are too vague or conclusory to state a claim; and, 10) plaintiffs reliance on unidentified federal statutes cannot be the basis for a federal claim.

In this court's order of March 27, 1980 denying the County's motion to dismiss, the issues raised by the defendant were not dealt with substantively. Rather, it was decided that "the

case is not ripe for disposition at this time." It was felt that a full hearing would put the court in a better position to rule on the issues raised. The development of the factual record at the hearing was such that rulings are now able to be made.

II. JURISDICTION

The plaintiff has alleged various bases for the court to exercise its jurisdiction in this case. Each of them will be examined separately.

A. FEDERAL QUESTION STATUTE

Jurisdiction against defendant Harris is alleged through 28 U.S.C. § 1331(a):

> The district courts shall have original jurisdiction of all civil actions wherein the matter...arises under the Constitution, laws, or treaties of the United States....

The plaintiff has alleged that defendant Harris' official conduct has violated the Fifth Amendment, thus giving this court jurisdiction because the matter "arises under the Constitution." See also, Gautreaux v. Romney, 449 F.2d 731, 734 (7th Cir. 1971).

The hearing was limited, by stipulation, to issues dealing with the County defendants. 1/

B. DECLARATORY JUDGMENT ACT

The plaintiff has alleged that jurisdiction is invoked under 28 U.S.C. §§ 2201, 2202. Both of those sections merely create a federal remedy when "a case of actual controversy within

---

1/ The parties agreed to this arrangement, and it in no way constituted a waiver of the plaintiff's claims against the federal defendant. Furthermore, in no way did plaintiff's decision to participate in a hearing involving only the County defendants constitute an admission that federal jurisdiction was lacking.

its jurisdiction" is brought in this court. They do not confer jurisdiction, but rather give this court the power to "declare the rights and other legal relations of any interested party seeking such declaration...." In this case, the court has jurisdiction under 28 U.S.C. § 1343, as will be discussed later. The validity and enforceability of the Agreement will be determined through the power vested in this court by 28 U.S.C. §§ 2201, 2202.

C. CIVIL RIGHTS STATUTES

Plaintiff sets out in its complaint a cause of action under 42 U.S.C. § 1983 against the County for unlawful deprivations of plaintiff's property interests without due process of law. This deprivation allegedly has taken place "under color of state law." While § 1983 creates a federal cause of action, jurisdiction itself is provided through 28 U.S.C. § 1343. The court will address the jurisdictional aspects of the § 1983 violations.

The threshhold question in any due process case is whether the alleged deprivation was the product of state action. The question of state action must be answered as a jurisdictional matter, before considering any other issues. Robinson v. Bergstrom, 579 F.2d 401, 404 (7th Cir. 1978). In this case, the complained of actions were taken by Commission members and by County representatives. All of these people were employees of clearly state-related instrumentalities. The general rule is that "an individual's conduct is engaged in under color of law if clothed with the authority of the state and purporting to act thereunder, whether or not the conduct complained of was

authorized." Robert v. Acres, 495 F.2d 57 (7th Cir. 1974), citing Monroe v. Pape, 365 U.S. 167 (1960), and Screws v. United States, 65 S.Ct. 1031 (1944). In this case, Commission members were not acting individually, wherein arguments as to scope of authority might lie. Rather, they were acting in their official capacities, "clothed with the authority of the state." Quite clearly, state action is involved here.

Having determined that state action exists, this court can properly exercise its jurisdiction to consider whether the plaintiff has a protectible property interest. The subject of what constitutes a protectible property interest was discussed thoroughly in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 2699 (1972), the Court again spoke on property interests:

> ..."property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit...

In Perry, a written contract with an explicit tenure provision "clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient cause is shown."

It must be remembered that the Fourteenth Amendment's protection of property has never been interpreted to safeguard only the rights of undisputed ownership. Fuentes v. Shevin, 407 U.S. 67 (1972). Rather, it has been read broadly to extend protection to "any significant property interest." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). A reasonable reading of the Agreement will show that the Board was entitled to eventual undisputed ownership of the Center, and that the Board has a significant property interest entitled to Constitutional protection. An analysis of the nature of this property interest follows.

In this case, it is the Agreement that creates a protectible property interest. Quite clearly, the plaintiff has a protectible property interest in the present operation of the Center. Prior to self-sufficiency, the plaintiff has the right to participate in the administration of the Center, including the

dispensation of a 1% discretionary fund, through its participation in the Joint Liaison Committee.

The fact that the Board has a "legitimate claim of entitlement" to eventual ownership of the Center is a point that the defendants hotly dispute. Defendants assert that plaintiff's alleged property interests involve no more than an expectancy or anticipated interest in the Center at some unknown date in the future.

Initially, the court will look to the Agreement to see if the plaintiff is justified in feeling it has "a legitimate claim of entitlement" to the Center, rather than just "a unilateral expectation of it."

Paragraph 1 of the Agreement reads in relevant part:

> The Commission shall provide the start-up monies needed...until the point in time that the clinic has reached economic self-sufficiency and the Uptown Community Board requests complete independence from the Commission... Thus, the Commission shall have the right to relinquish its authority in the operation of the clinic, thereby making the clinic an independent operation of the Uptown Community Board, upon the demand and tender of the Uptown Community Board of the current market value of the lease and equipment unless those debts are retired or forgiven.

Defendants argue that because they only have the <u>right</u> to relinquish their authority in the Center, rather than an <u>obligation</u> to relinquish it, no entitlement of ownership exists. If the court were to read this portion of the Agreement in a vacuum, it may be inclined to agree with the defendants. However, if that section is

considered along with the rest of the Agreement, the extensive testimony heard, and the voluminous documents proferred, the only conclusion that can be reached is that the plaintiff quite reasonably expected to be given ownership of the Center upon meeting the self-sufficiency requirements.

There is overwhelming evidence in the record that the Commission fully intended to turn over control of the Center to the Board when the self-sufficiency requirements were met. This evidence took several forms. Significantly, the rest of the language of the Agreement itself suggests that the "right" to relinquish control is another way of saying the Commission will relinquish control. For instance, paragraph 3, page 1 of the Agreement reads: "Whereas, the Uptown Community Board is desirous to operating the Uptown People's Health Center...independently and thus desires to develop self-sufficiency in operations...." Paragraph 1, page 2 reads: "Whereas, the Commission believes in the concept of efficiently managed community owned and controlled ambulatory health care facilities...." Paragraph 2, page 2, reads: "...the [Board] and the Commission hereby agree to the operation of the [Center], with the ultimate goal being ownership and control by the [Board]...." Paragraph 1, page 3 reads: "The Commissions provision of funds for the start-up costs...[are] to be repaid after acquisition of the clinic by the Board." Paragraph 3, page 6 reads: "The Commission will maintain and help to facilitate the development of the clinic until economic self-sufficiency is achieved."

Nowhere is there any mention of the possibility that control will not be turned over upon the Center's attaining economic self-sufficiency. The above-quoted language clearly manifests the intentions of the parties. That intent was to turn over the Center to the Board when self-sufficiency was attained. The language of the entire Agreement makes that intent unequivocal.

The testimony of both Walter Coleman and Helen Shiller revealed that the Board members always intended that the Board would ultimately own and control the Center, and the Agreement was a manifestation of that intention. Even more significantly, however, a former member of the Commission, Philip Ayala, testified that it was always contemplated and intended by the Commission that the Board would have the right to and would in fact own the Center. The testimony of fellow Commission member Sybille Fritzche confirms that the Commission so intended.

Minutes from the Commission's Community Planning Committee also reflect the fact that the Commission intended for the Board to eventually take over the Center. The minutes of the April 12, 1978 meeting read: "We will lease the center from the bank until the community buys the building." (Plaintiff's Ex. B11). That is an unconditional statement that evidences an intent that the Board would eventually own the Center. In fact, the Community Planning Committee felt that the Commission had the responsibility to teach community boards so as to prepare them for the time when

they would take over the operation of the Center. (Plaintiff's Ex. B19, p.4).

Thus, it is very clear that the plaintiff has a protectible property interest in both the present operation of the Center, and in the eventual ownership of it. This property interest is created by the Agreement. There is a mutually explicit understanding between the parties that the Board is entitled to participate in the present operation of the Center and is entitled to eventually own it. For the County to argue otherwise denies the realities evidenced by the clear language of the entire Agreement and the clear testimony of the witnesses. A protectible property interest for due process purposes exists in this case.

The question the court is now faced with is how much farther in its analysis of the civil rights violation must it go. The hearing was held for the purpose of deciding the validity and enforceability of the Agreement. While the parties may now argue that civil rights violations may or may not exist, the plaintiff in its post-trial brief (p.12) succinctly sets forth the issues addressed at the hearing:

> Essentially, three basic issues have been presented to the Court as to the County:
>
> 1. Is the Agreement between the Community Board and the Health and Hospitals Governing Commission a valid, binding and enforceable Agreement?
>
> 2. Did the County and its agents and employees, engage in conduct which wrongfully interfered with the plaintiff's rights under the Agreement?

3. Was the wrongful conduct of the defendant somehow justified by some alleged breaches of the Agreement by the plaintiff?

Issues 1 and 3 most certainly are contract issues. Issue 2, while arguably charging some kind of due process violation, was also presented to the court at the hearing as a contract issue. That issue was whether the County breached the Agreement. In the final analysis, the question with which the court was presented at the hearing was whether a valid contract exists, and if so, whether anyone breached it. The due process violations, which may naturally flow from a contractual breach, were never really the focus of the inquiry at the hearing.

By not ruling on the specific due process theory advanced by the plaintiff in its brief, a jurisdictional issue is raised as to whether the pendent contract claims can be heard. For the court to entertain the state claims, the federal claim must have substance sufficient to confer subject matter jurisdiction on the court. United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). When there is jurisdiction because of a substantial federal claim, there is power to hear pendent claims when they derive from a common nucleus of operative fact and the claims are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding. Id. The due process claims that are the basis of the federal jurisdiction are inextricably intertwined with the contract issues and clearly derive from a common nucleus of operative fact. Also, it would be ludicrous to expect the

plaintiff to not try all the claims in this one proceeding. For any court to duplicate all of the time already put into this case would be a gross waste of judicial resources. Thus, the state claims are truly pendent. Moreover, the Supreme Court has encouraged the use of pendent jurisdiction and has limited a district court's discretion to reject it in Hogans v. Lavine, 415 U.S. 528, 545-546 (1974), where it said: "Given the advantage of economy and convenience and no unfairness to litigants, [the doctrine] contemplates adjudication of these [pendent] claims." This is particularly true where the district court must decide pendent claims first. See, e.g., Almenares v. Wyman, 405 U.S. 453 F.2d 1075 (2nd Cir. 1971), cert. denied, 405 U.S. 944 (1972), and Williams v. Wohljemuth, 540 F.2d 163 (3d Cir. 1976).

The due process claims satisfy the substantiality test. Federal claims will satisfy the substantiality requirement for pendent jurisdiction purposes when they cannot be dismissed on the face of the pleadings alone. In re Union National Bank & Trust Co. of Souderton, Penn., 298 F.Supp. 422 (D.C. Pa. 1969). So long as the federal claim is not clearly unsound or obviously without merit it is sufficient to confer jurisdiction over the non-federal claim. Id. The ultimate disposition that may be made of a federal claim is immaterial in determining whether it is sufficiently substantial. Rumbaugh v. Winifrede R. Co., 331 F.2d 530 (4th Cir.), cert. denied, 379 U.S. 929, 85 S.Ct. 322 (1964). See also, International Association of Firefighters Local 2069, City of Sylacauga, 436 F.Supp. 482, 489 (N.D. Ala. 1977).

In this case, the plaintff's federal claims are so substantial that they have nearly been proven at a hearing where the focus was not even on such claims. As pointed out, state action is involved and a protectible property interest exists. The question of whether the process that is due was afforded by the County will not be decided by the court as its resolution would go beyond the scope of the hearing. In fact, in a minute order dated May 6, 1980, the court specifically noted that the hearing would only address "the question of declaratory and preliminary and permanent injunctive relief." The minute order of April 25, 1980 ordered the parties to submit a statement of issues surrounding the hearing "on the contract in dispute." 4/

D. POLITICAL QUESTION

The County has argued that the issues raised by the plaintiff constitute a "political question, not capable of resolution in a court of law." This argument is really an adjunct to the claim in the motion to dismiss that the County has unfettered discretion in funding and refusing to fund projects with tax monies. It is well established that the federal courts will not adjudicate political questions. Oetjen v. Central Leather Co., 246 U.S. 297 (1918). In Baker v. Carr, 369 U.S. 186 (1962), the Court noted that political questions are not justiciable

4/ The court is in no way suggesting that further hearings be held. The rulings on the contract issues should put the parties in a position to resolve the remainder of the lawsuit. It should be remembered that the hearing was held not just as to certain defendants, but also only as to certain claims. Thus, only Count III of the complaint, as it relates to the County defendants, is being decided in this order.

primarily because of the doctrine of separation of powers within the federal government. The Court concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 369 U.S. at 217.

This case involves none of those situations. The court is not dictating to the County how it must spend its funds. Rather, this court is making clear to the County that when it, like private parties, enters into a valid and enforceable contract, it must live up to the obligations imposed in it. Failure to do so not only results in a simple breach of the contract, but also carries with it possible constitutional ramifications because of the property deprivation which may occur. Because of the nature of the parties involved, and because of the controversial characteristics of any dispute involving the provision of health care services, this case obviously has "political" aspects to it. But the term "political" is only used in its generic sense, because a "political question," as defined by the Supreme Court, does not exist here.

II. CONTRACT ISSUES

Upon the finding that the plaintiff has raised a substantial federal claim against the county, and upon finding that the state claims are pendent, the court will examine the state contract law issues raised.

It should be noted at the beginning of this discussion that it was the County who originally prepared the Agreement. Ambiguities in a contract are construed most strongly against the party who wrote it. As observed in Donahue v. Rockford Showcase & Fixture Co., 87 Ill.App.2d 47, 230 N.E.2d 278 (2nd Dist. 1967), "The contract will be construed most strongly against the party who prepared it for the reason that he chose the words to be used and is therefore more responsible for the existence of ambiguity." See, also, Pescaglia v. Gianessi, 9 Ill.App.3d 582, 295 N.E.2d 148 (2d Dist. 1973). Keeping that general principle in mind, the court will consider the County's arguments.

A. COMMISSION AUTHORITY TO ENTER INTO CONTRACTS

The County defendants claim that the Agreement between plaintiff and the Cook County Health and Hospitals Governing Commission is prohibited and null and void under the Counties Act, Ill.Rev.Stat., ch.34, §§ 951, 2104. Section 2104 prohibits the County Board from making contracts requiring expenditures in any year in an amount above that provided for in the annual budget for that fiscal year. Section 951 prohibits the Cook County Board of

Commissioners from delegating to anyone the power to enter into any contracts involving expenditures in excess of $2,500.00. The County contends that the Cook County Health and Hospitals Governing Commission acted outside of the scope of its authority when it entered into the Agreement.

Upon review of the Counties Act, it is clear that their limitations refer only to the activities of the Cook County Board of Commissioners. The signatory to the Agreement, the Commission, was an entirely separate and independent entity created under Ill.Rev.Stat., ch.34, § 5011 et seq. (1977). No limitations such as those imposed on the Board of Commissioners were placed on the powers of the Commission. Rather, the powers given the Commission were quite broad:

> The Commission, as agent to the County in which the Commission exists and without further authorization from that County or the Board of Commissioners thereof, shall have and exercise on behalf of that county, the following powers...to form agreements for the provision of needed health services with public or private non-profit hospitals or health care facilities within the county...; to make and enter into contracts to accomplish any or all of its purposes....

The agreement that the Commission entered into was a proper exercise of its authority as outlined above. Moreover, it is not restricted by either § 2104 or § 951 because those sections by their express terms only apply to the County Board (Board of Commissioners). Finally, the Governing Commission was an independent body created by the legislature for a specific purpose.

The extensive statutory authority granted the Governing Commission in Ill.Rev.Stat., ch.34, § 5011 et seq. (1977) reflects this independence. The County's objections on this point are without merit.

B. TAKEOVER STATUTE

The County takes the position that the Agreement entered into by the Governing Commission is beyond the present statutory authority of the Board of Commissioners, and therefore the Board of Commissioners cannot be bound by the Agreement.

By statute, the Health and Hospitals Governing Commission's existence was terminated as of December 1, 1979. The Board of Commissioners took over the rights, duties and obligations of the Commission. The "takeover" statute, P.A. 81-1197 § 3, became effective November 30, 1979 and amended Ill.Rev.Stat., ch.34, § 5020 by providing:

> The Board of Commissioners shall have and exercise all rights, powers, duties heretofore exercised by the Commission. All books, records, papers, documents, property, real and personal, unexpended appropriations and pending business in any way pertaining to the rights, powers and duties of the Commission shall be transferred and delivered to the Board of Commissioners. All rights, duties and obligations of the Commission shall become the rights, duties and obligations of the Board of Commissioners. (Emphasis added.)

When the statutory language is so clear, there can be little argument on the issue. Quite clearly, the Board of Commissioners is liable for any obligation incurred by the Governing Commission. One such obligation is the Agreement, and the Board of

Commissioners has the same responsibilities under that Agreement that the Governing Commission had. Obviously, the legislature cannot "pass any law impairing the Obligation of Contracts" (Article I, § 10 of the Constitution of the United States). Common sense also would tell us that the legislature cannot by a simple deft stroke of its pen wipe out legal and enforceable obligations of the state or County.

C. CONSIDERATION

Defendants contend that the Agreement is not supported by consideration. The essence of consideration is legal detriment that has been bargained for, and exchanged for, a promise. Consideration for a promise has been defined in the Restatement of Contracts, § 75 (1932) as: (a) an act other than a promise, or (b) a forebearance, or (c) the creation, modification or destruction of a legal relation or a return promise bargained for and given in exchange for the promise. Illinois courts have recognized that mutual and concurrent promises afford sufficient consideration for the support of each other. Leisure v. Smith, 13 Ill.App.3d 1070, 302 N.E.2d 177 (5th Dist. 1973). See also, Nathan v. Leopold, 108 Ill.App.2d 160, 247 N.E.2d 4 (1st Dist. 1969).

In this case, each party to the Agreement made certain covenants, including: (1) the Commission's covenant to provide start-up monies and counsel in the management of the Health Center, (2) the creation of a Joint Community Board-Commission Liaison

Committee responsible for the making of policy decisions subject to the approval of the Board and the Commission before implementation, (3) the Community Board's administrative responsibilities via its participation in the Joint Liaison Committee, and (4) the Community Board's responsibility for all billing and collection.

There is absolutely no question in this court's mind that significant contributions were made by the Community Board both in the operation of the Center and in helping to put it in operation. These contributions included: development of outreach programs, conducting financial interviews, applying for federal funds, making the Center accessible to the community, orientation of new patients, marketing the Center, and bringing ideas to the Joint Liaison Committee. The Community Board acted to its detriment in performing these services. Clearly, its actions were taken in reliance on promises made in the Agreement by the County, and constitute legal consideration for the Agreement.

D. CERTAINTY OF TERMS

The County claims that the Agreement is not a valid contract because only the responsibilities of the Commission are clearly delineated. The County also argues that the effect of the self-sufficiency clause is uncertain. In making that argument, the County restates much of its previous argument regarding the "right" versus the "obligation" of the Commission to turn over ownership of the Center to the Board upon self-sufficiency being reached.

The argument that only the responsibilities of the Commission are delineated is simply in error. The Board's responsibilities as to Liaison Committee representation (Agreement, p. 3, 4, ¶¶ 3, 5), and billing (Agreement, p. 5, ¶ 8) are set forth with the same particularity as the Commission's responsibilities regarding administrative authority. The question of the supposed ambiguity in the self-sufficiency clause was discussed at length when the court earlier found that a protectible property interest exists. The discussion there is obviously applicable here, and it will not be restated.

The County argues that no definite termination date is set in the Agreement. As noted by both parties, the rule in Illinois is that "if no date is fixed by the contract of joint adventure for its termination, the agreement remains in force until its purpose is accomplished, or until such accomplishment has become impracticable." Maimon v. Telman, 40 Ill.2d 535, 538, 240 N.E.2d 652, 655 (1968). The purpose of the Agreement, as previously stated, is for the Center to become self-sufficient. If the Agreement does not include a definite termination date, this court can imply a reasonable time for performance. The Center should at least be allowed the original term (five years) of the lease on its building to establish its independence. The acknowledged goal of both parties is for the Center to become self-sufficient. Thus, it would appear that an agreement on this point can be reached.

The County argues that the alternative stated in Maimon, that is, "or until such accomplishment has become impracticable" should be applied, since self-sufficiency is impossible at this time. It is apparent to the court that, in order for the Center to become self-sufficient, it must have the contractually guaranteed cooperation of the County. It is unconscionable for the County to argue that the Agreement may be terminated because its goal is impracticable, when it is the County's own deliberate acts that are contributing to and causing any alleged impracticability in the accomplishment of that goal.

In view of the fact that it was the County who drafted the document, this court rejects the County's argument that the terms of the Agreement are uncertain.

E. MUTUALITY

The County contends that the Agreement does not bind the Board to do anything. It is argued that nothing in the Agreement obligates the Board to request independence or tender the value of the lease. Thus, the obligations of the Board are illusory and the Agreement lacks mutuality.

It appears to the court that the obligations involved in the Agreement contemplate a good faith effort on the part of both parties to achieve the ultimate goal of the Agreement, that is, the ownership and control of the Center by the Board. It is unrealistic for the County to suggest that, in order for mutuality to exist, the Agreement must "require" the Board to request

independence. The independence and self-sufficiency of the Center is the goal of the Agreement. The parties are obligated by the terms of the Agreement to make every effort to achieve that goal.

The court finds that there is mutuality of obligation and that a valid and enforceable contract exists between the parties.

F. BREACH OF THE AGREEMENT BY THE COUNTY

The County, through its representatives, clearly took certain actions which amounted to breaches of the Agreement. The principal representatives involved were Dr. Ronald Shansky, the medical director of the Center, and Dr. James G. Haughton, the Executive Director of the Commission.

It is clear from the evidence presented at trial that Dr. Shansky, as medical director of the Center, owed a fiduciary duty of loyalty to the Board as well as to the County. It was his responsibility to implement the policy set by the Joint Liaison Committee and to act in the best interest of the Center. Any actions which would tend to undermine the efforts of either the County or the Board to operate the Center would be a breach of that duty.

The evidence has shown that, as the negotiating officer of the Center in the grant application process, Dr. Shansky breached his duty of loyalty to the Board by compromising its authority with several of the funding grantors. Dr. Shansky was aware that, in order for the Center to become self-sufficient, it was necessary for the Board to be the grantee of the various grant

applications. Notwithstanding that fact, the record shows that Dr. Shansky compromised the authority of the Board in at least one instance by communicating to HEW the fact that he perceived problems with the Board's ability to function. Without the Board's knowledge, he engaged in a course of conduct which seriously compromised the Board's chances of receiving various HEW grants.

Dr. Shansky also failed to act in the best interests of the Center when he arranged a closed meeting of members of the Center's staff to discuss the Family Health Plan presented by the Board. At that time, Dr. Shansky and the staff discussed various complaints they had about the Board and Dr. Shansky subsequently circulated a petition urging that the Board be reconstituted or dissolved.

The Agreement provides for a mechanism whereby legitimate objections to Board proposals can be heard and resolved (the Liaison Committee). It was Dr. Shansky's duty to employ that mechanism. His failure to do so is another example of his total lack of regard for his obligations to the Board.

Dr. Haughton breached the Agreement when he unilaterally "divorced" the present Board from the Center. By his actions, Dr. Haughton prevented the Board from receiving an Urban Health Initiatives Grant.

Dr. Haughton essentially "froze out" the present Board and started taking steps to form a new one. These actions were in breach of the Agreement and, as will be discussed later, were in no

way justified on the alleged grounds of wrongful conduct on the part of the Board.

It is apparent from the record in this case that the medical staff and administrators resented the Board's attempts to influence policy decisions with respect to governing the Center. Rather than using the Liaison Committee to resolve their differences, however, the staff interfered with the Board's grant application procedures and, ultimately, attempted to dissolve the entire Board.

The actions of Drs. Shansky and Haughton were not in the best interest of the Center and represent a breach of the Agreement.

G. BREACH OF THE AGREEMENT BY THE BOARD

Various actions of the Board and its members are alleged by the County to have constituted breaches of the Agreement. Most notable among these alleged breaches is the alleged use of the Center by various Board representatives for personal political purposes. While there appeared to be some organized and arguably political activity surrounding the creation of the Center itself, it is unlikely that all such activity could have been avoided. More significantly, however, none of the evidence offered at trial indicated in any way that the provision of health care was ever compromised or interfered with because of political activities of the plaintiff.

It should be noted that Board member Helen Shiller was extremely conscious of the potential appearance of impropriety which would occur if she remained on the Board during her aldermanic campaign. To that end, she took a leave of absence from the Board during that peri[illegible]. There was never any showing that any of the staff at the Center were forced to campaign for Shiller. Moreover, voluntary participation in a political campaign is both a right and privilege which may not constitutionally be prohibited or compromised except in certain limited instances, none of which are present here.

Many arguments were made at the hearing concerning the activities of the advocates. It is important to note that they are strictly volunteers performing a public service. Any of the problems supposedly created by them appear to be of a minor or even petty nature. Certainly none of these problems rise to the level of constituting a breach of the Agreement. The County's principal objection to the advocates concerns the lack of definition and understanding of the roles they are to play. Again, while the Agreement specifically provides for discussion at the Liaison Committee level in order to resolve such disputes, this avenue was apparently not pursued.

The County's contention that the advocates were "spies" for Walter Coleman was simply never proved.

Without going into further detail, this court simply notes that none of the alleged indiscretions of the Board, even if

proved, would or could constitute a breach of the Agreement. The Board is not blameless in this case. The remedy for any problems the Board may have caused, however, was negotiation and reconciliation, not the "divorce" effected by Doctor Haughton.

The County continually argued before the court that the problems which developed at this health center were the result of more than just a personality conflict. However, after more than a week of testimony, this court is compelled to disagree. This entire dispute had its genesis in a personality conflict. The conduct of both parties is at best disappointing and at worst irresponsible, considering the fact that it is the provision of vital health care services to a needy community that has been severely compromised by their actions.

Plaintiff's exhibit 36a, which is the minutes of a meeting in Dr. Haughton's office before the "divorce" was declared, reads in part:

> Ron [Shansky] then stated that it was clear that Coleman and Shiller had lost confidence in himself and possibly Mary Kuttner. He feels that the real issue is Ron and Mary Slim [Coleman] and Helen.

That quote is just a small indication of the personality conflicts which fill the entire record. This court does not want to force a particular composition of the Board. Board representation was never an issue this court considered particularly relevant to the greater issues involved at the hearing. Nor does the court wish to dictate what staffing the Center must have. It seems to be

perfectly within the capabilities of both parties to be able to soften their positions on Board composition and Center staffing in order to reach a compromise.

Former Commission member Sybille Fritzche noted that the success of the whole Agreement was based on the parties working together. The parties evidenced an ability to work together at the beginning of the relationship. It was only when the Board proposed a health care program which was objectionable to certain staff members that the relationship started to deteriorate.

If the Board is unrealistic in its proposals, a less drastic remedy than trying to oust the old board in favor of a new board is available to both the staff and Dr. Haughton. Although the professional staff certainly is more informed medically as to what types of health care are feasible and effective, proposals by the Board represent attempts at solutions for special problems perceived in the community. Ideally, the Board's direct interaction with the community should put them in a position to recognize particular health needs. The needs should then be communicated to the professional staff for evaluation and discussion. If a proposal is not feasible, a reasoned compromise which ultimately benefits the users of the Center hopefully can be effected. Outright rejection of a proposal without valid and properly explained reasons can only lead to the types of problems experienced by the Center.

So also, the Board must not expect the professional staff to blindly accept all of its proposals, as it is the staff's responsibility to provide the best medical service possible within a limited budget. The staff has a special expertise in this area which must be given great weight and its recommendations should be carefully considered by the Board.

The language of the Agreement provides a framework for accomplishing meaningful communication through the Liaison Committee. It should be utilized by both parties.

III. CONCLUSION

In summary, using the power vested in the court through the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, this court finds that the Agreement is a valid and enforceable contract, and that it was breached by the County. It further finds that the Board did not breach the Agreement. The parties may continue to utilize the services of the Community Relations Service, and report to the court their progress in resolving the remaining difficulties.

E N T E R:

_____
Stanley J. Roszkowski, Judge
United States District Court

Dated _____.

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2226

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

v.

THE BOARD OF COMMISSIONERS OF COOK COUNTY and the COUNTY OF COOK,

Defendants-Appellants,

v.

PATRICIA ROBERTS HARRIS, in her capacity as Secretary of the Department of Health and Human Services,*

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-32—Stanley J. Roszkowski, *Judge.*

ARGUED JANUARY 9, 1981—DECIDED APRIL 21, 1981

Before PELL and WOOD, *Circuit Judges*, and BONSAL, *Senior District Judge.***

WOOD, *Circuit Judge.* This case involves the appeal of Cook County, Illinois and the Board of Commissioners of Cook County (referred to collectively as "Com-

* Referred to in this opinion under the former name of Department of Health, Education and Welfare.

** The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

missioners" or "County defendants") from the district court's adverse ruling on several contract claims that are part of a suit brought by the Uptown People's Community Health Services Board of Directors ("Board"). The suit pr.ses federal and state pendent claims against the County defendants, and also names Patricia Harris in her capacity as Secretary of the U.S. Department of Health, Education and Welfare ("HEW") as a defendant in certain claims.[1] The district court decided only pendent claims. The County defendants contend as a threshold matter that the district court lacked pendent jurisdiction over the contract claims, and thus should not have ruled on them. We agree and therefore reverse and remand with instructions to dismiss the case.

I.

This case centers on an agreement between the Commissioners and the Board that helped establish a community out-patient health clinic in the Uptown area of Chicago. The idea for the clinic began in 1977, when a group of Uptown residents determined that the health care needs of the community required locally available out-patient care, which at the time was not obtainable. The residents consulted with the Commissioners,[2] who

---

[1] While Harris is the named federal defendant, the Complaint specifies no actions taken by her or on her behalf. The Complaint variously attributes the acts complained of to HEW as an entity and to unnamed representatives of HEW. The Commission cites cases suggesting that Harris could not be liable for monetary damages under 42 U.S.C. § 1983 as a participant with the state unless she played an affirmative role in the deprivation of the Board's rights. *See, e.g., Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971). The § 1983 issue is not dispositive of all claims pressed against Harris, and neither side to this controversy argued the extent to which declaratory or injunctive relief could be applied to Harris for the actions of HEW personnel. We need not and do not decide that issue.

[2] At the time, the Commission was called the Health and Hospitals Governing Commission. That entity was legislated out of existence in 1979, with the present defendant Com-

(Footnote continued on following page)

oversaw the delivery of health care services in Cook County hospitals and out-patient facilities. The Commission was not receptive to the idea of bearing the full burden of financial assistance to the clinic, although it indicated a willingness to help. It appeared that grant money and other assistance to operate the clinic might be forthcoming from the National Health Service Corps ("NHSC") and HEW. NHSC is a federal program that provides medical personnel and equipment to clinics such as the one involved here. Under NHSC regulations, the salaries of NHSC personnel provided to the clinic need not be reimbursed to the government if a community group rather than a state agency applies for the grant money. Hence, the interested residents of Uptown formed the Board.

An HEW official informed the Commissioners and the Board that in order for the Board to qualify for a grant the two Illinois parties would need to sign a cooperation agreement, which they did. HEW is not a signatory to that agreement. The agreement is the center of this litigation.

The portion of the agreement relevant to this appeal states that the Commission is to provide "start-up monies" and "its counsel in management and administration of the clinic until the point in time that the clinic has reached economic self-sufficiency and the [Board] requests complete independence from the Commission."[3] When "the ultimate goal" of economic self-sufficiency is reached "the Commission shall have the right to relinquish its authority in the operation of the clinic" to the Board. In addition, the agreement established a liaison committee to channel interaction

[2] *continued*
missioners assuming the former Commission's rights, duties and obligations. Ill. Rev. Stat. Ch. 34, § 5020, *as amended* P.A. 81-1197, § 10 (1979).

[3] The agreement defines "economic self-sufficiency" as a six-month period wherein the clinic's revenues exceed its operating costs by ten percent of the latter amount. The record shows that the clinic has not reached economic self-sufficiency.

between the Commission and the Board on matters of clinic policy.

The Board contends that the agreement grants it a property right: present participation in and future control of the clinic upon the attainment of economic self-sufficiency. The Board says that certain actions by HEW and the Commission constitute a breach either of that agreement or of general fiduciary obligations, damaging the Board's present right to participate in the clinic's operation and its expectancy interest in gaining control of the clinic. This litigation focuses not on the quality of health care at the clinic, but rather on who will be in charge of the clinic if it can survive its internal turmoil.

The relationship between the Commission and the Board began to falter soon after the clinic opened. During informal and formal meetings, the NHSC- and Commission-provided staff charged that the clinic was being used to further the campaign for alderperson conducted by a Board member, Helen Schiller. In particular, the staff alleged that non-medical support staff began to miss a great deal of worktime as election day neared. Election canvassing allegedly was going on at the clinic. The clinic's medical director testified that one of the Board members, Walter "Slim" Coleman, indicated that he was pleased that the clinic had conducted a mobile hypertension screening program in the community, since it gave Coleman the opportunity to leave campaign material in a building that otherwise was off limits because it was run by Schiller's opponent. And during the campaign, the clinic receptionists increasingly found that patients were demanding free medical care or instant attention without an appointment, all on the basis of statements allegedly made to them by Board members.

Other staff complaints centered around Board-appointed "patient-advocates" who allegedly manipulated the information on patient intake forms so that some patients would qualify for lower rates or free medical care under the clinic's sliding fee scale, when in fact the patients earned sufficient income to pay for

medical services at a higher rate. The staff also complained that the patient-advocates questioned the physicians' medical judgment within hearing of the patients. There was a general complaint that the patient-advocates acted as spies for a community political action group.

The staff expressed special concern over a Family Health Plan proposed by the Board. No one opposed the idea in the abstract, but the proposal set forth by the Board would entail extensive funding for expansion into new areas, which the staff felt was unwise given the shortage of staff and equipment in existing areas of clinic operation. Perhaps most disturbing to some was that the document setting forth the Plan appeared to be more a political polemic than a proposal for effective medical care. The document asserted that the Board represented "a community that is under attack" and "fighting for its survival." This required "an organized consumer base," a term that seemed ill-defined and not directly related to health care.

Tensions simmered, and eventually the executive director of the Commission announced the Commission's intention to "divorce" the Board and run the clinic on its own until a new community Board could be created or the present one reconstituted. The Board responded by charging that the Commission had failed to inform the Board of the depth of staff dissatisfaction. The Board concluded that the medical director had not handled staff complaints in the best way, and had actually exacerbated problems to put the Board in a bad light. Especially galling to the Board was the Commission's alleged failure to utilize the liaison committee provided for in the agreement as a way to foster co-operation. There also was concern that the medical director had undermined the Board's relationship with the clinic's grantors by presenting the Board in an unfavorable light to HEW and others.

As a result of the friction generated between the Board and the Commission, one potential grantor withdrew its approval of funds to implement the Family Health Plan described earlier. The NHSC personnel

eventually wrote to HEW stating that they would no longer continue with the clinic unless the Board was reconstituted. The Commission received a communication from HEW saying that HEW would support the Commission's attempts to create a new Board. HEW then held up payment of a grant to the Board, since it no longer recognized the Board as a grantee. The present litigation commenced.

II.

The Board filed a six-count complaint. Count One alleges in general terms that HEW violated statutes creating the NHSC program, unspecified regulations governing the administration of NHSC, and the terms of the NHSC grant. Count Two alleges that the Commissioners acted with HEW to deprive the Board "of its property without due process of law" in violation of the Fifth and Fourteenth Amendments to the federal Constitution and of the Civil Rights laws, namely 42 U.S.C. §§ 1983 and 1985(3).

Count Three alleges in general terms that the Commissioners breached their agreement with the Board, and is wholly a state claim. This is the Count on which the district court focused. Count Four alleges that the Commissioners have breached "their obligations of trust" to the Board, and that HEW participated in that breach.

Counts Five and Six allege breaches of Article I, § 10 of the United States Constitution (the Contract Clause) and Article I, § 2 of the Illinois Constitution.

The Complaint asks that the district court "[d]eclare that the agreement between the [Board] and the [Commissioners] is binding against all agencies like HEW . . . and that these agencies must honor their commitments to the [Foard] and deal only with the [Board] with regard to the [clinic]." The Complaint also seeks unspecified monetary damages and an order enjoining the allegedly wrongful conduct described in the Complaint.

Both the County and federal defendants moved to dismiss or for summary judgment, raising jurisdictional

objections and legal defenses. The jurisdictional contentions asserted that there was no substantial federal claim to which the state claims could be pendent. The district court denied the motions, stating that the case was "not ripe for disposition" at that time.

Having failed to obtain a determination on the motion, federal defendant Harris submitted a motion to require a more definite statement. The motion articulated line by line through the Complaint what was needed to determine if a cause of action had been alleged. The district court granted the motion in full by ordering the Board to amend its Complaint by a specified date. The Board never complied with the district court's order. The Complaint remains on appeal as it stood at the time of the filing.[4]

The case proceeded to trial only on the state claim questions of whether the agreement was a contract and, if so, whether the County defendants unreasonably violated the contract. The federal defendant did not participate in this hearing on the state claims.

The district court concluded that the agreement constituted a contract and that the Commission breached its duties under the agreement. While it discussed the federal claims in terms of their jurisdictional significance, the district court did not render judgment on them. This case is before us pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and claims against federal defendant Harris remain before the district court.

III.

In a case that does not involve diversity of citizenship, a federal district court may exercise its discretion to consider state law claims only when they arise out of the same nucleus of operative fact that supports the court's

[4] The Board filed a detailed response to the Commission's motion for a more definite statement on the claims relating to the County defendants. The district court declared moot the Commission's motion on the basis of that response.

jurisdiction of a substantial federal claim, and the federal and state claims are such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). The district court in this case incorrectly concluded that it had pendent jurisdiction over the state claims. No substantial federal claims were alleged in the Complaint, so there was nothing to which the state claims could be pendent.

To begin with, the district court utilized an improper procedure to reach its determination on the substantiality of the federal claims. When the defendants asked the district court to determine as a preliminary matter whether it had jurisdiction of the Board's federal claims, the district court stated that the issue was not "ripe." But the issue of jurisdiction always is the threshold determination for a court, *Hagens v. Lavine*, 415 U.S. 528, 538-39 (1974), and may be especially important where, as here, the plaintiff who seeks to invoke federal jurisdiction alleges extensive state claims.

The proper procedure was followed in *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 409 F.Supp. 800 (D. P.R. 1975), where the court dealt with state contract claims and an allegation that the public telephone company had breached the private plaintiff's contractual rights without due process. The plaintiff's claims depended on state contract law, a determination that would have to be made in the exercise of pendent jurisdiction. The court in *Comtronics* concluded that it could not first determine the state law issues in a broad hearing, since "we need a jurisdictional basis *before* we can entertain the contractual state claim. We can not determine first if any contractual rights actually exist in order to then base jurisdiction on their unconstitutional deprivation." 409 F.Supp. at 811 (emphasis in original).

In the case before us, the district court should have made the initial determination on the pleadings, as did the court in *Comtronics*, whether or not a substantial federal question was alleged. *Gibbs, supra*, 383 U.S. at 727. The district court should not have put off consideration of the substantiality of the federal claims, hoping to

find the answer after a full trial on the state claims. Otherwise, the "considerations of judicial economy, convenience and fairness to litigants" that underlie pendent jurisdiction, *id.* at 726, are a nullity. In this case, the Commissioners were forced to trial on state claims when it was not clear that the court hearing the case had jurisdiction. The six-day trial on the contract claims might have resulted in the case being dismissed for lack of jurisdiction, a thorough waste of judicial resources. The district court should have determined at the outset, in a more limited proceeding, whether or not the Complaint alleges substantial federal questions so as to make pendent jurisdiction appropriate.[5]

Since the determination of whether or not jurisdiction exists is one of law to be determined from the pleadings, we may consider on this appeal whether the Board's allegations state a substantial federal claim. *Molina-Crespo v. Califano*, 583 F.2d 572 (1st Cir. 1978). Because even one substantial federal claim may be enough to support jurisdiction, we will consider whether the allegations against the state defendants and the federal defendant establish the district court's jurisdiction.

The State Defendants

The Complaint alleges the state's violation of 42 U.S.C. §§ 1983 and 1985(3), and the Contract Clause of the federal Constitution. The district court did not address the § 1985(3) or Contract Clause claims. Neither claim establishes federal jurisdiction.

It is settled that § 1985(3) requires that the alleged deprivation of rights be based on "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971); *Elbert v. Board of Education of Lanark*

[5] *Cf. Kimbrough v. Arkansas Activities Assoc.*, 574 F.2d 423 (8th Cir. 1978) (where district court disposed of case on non-federal grounds without addressing substantiality of federal claims at all, substantiality determination implied for purposes of appeal).

Community Unit, 630 F.2d 509 (7th Cir. 1980), *cert. denied*, ... U.S. ....., 49 U.S.L.W. 3725 (No. 80-1312 March 31, 1981). The Complaint does not remotely allege a class affected by the Commission's actions; indeed, it is only the *Board's* rights that are being asserted in this case. The Complaint does not state a claim under § 1985(3).

The federal Contract Clause is irrelevant to the jurisdiction question in this case, since it is pleaded in anticipation of a defense that the state law eliminating the former Health and Hospitals Governing Commission, *see* note 2, *supra*, also avoided or negated its obligations under the agreement at issue here. Such an allegation is not sufficient to establish federal jurisdiction. To the extent that the Contract Clause claim might be interpreted to allege a mere breach of contract, it does not raise a constitutional issue. *E & E Hauling, Inc. v. Forest Preserve Dist. of DuPage County*, 613 F.2d 675 (7th Cir. 1980).

The § 1983 claim is equally without merit. We view the pleadings on this contention with special care. As counsel for the Board candidly stated at oral argument, the case is one that turns solely on state law, and the Board seeks a trial in federal court because it believes it will receive a more sympathetic ear in this forum. Federal courts must be cautious when considering § 1983 claims to avoid results that imply that "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establish[es] a violation of the Fourteenth Amendment." *Paul v. Davis*, 424 U.S. 693, 699 (1976) (context of asserted liberty right to reputation). *See Meachum v. Fano*, 427 U.S. 215, 216 (1976) (not every "grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the due process clause"). We must be particularly wary of subjecting to federal judicial review the "wide spectrum of discretionary actions that traditionally have been the business of" state health care administrators rather than of federal courts. *See id.* at 224-25 (context of state prisoner's right to hearing before undergoing prison transfer).

The starting point for the analysis of the § 1983 claim is whether the agreement conferred on the Board a constitutionally protected right. *Holbrook v. Pitt*, No. 80-1006 (7th Cir. March 2, 1981) slip op. at 26. *See Morrissey v. Brewer*, 408 U.S. 471 (1972) (discussion in context of liberty interest). In its answer to the County's motion for a more definite statement of allegations, the Board explained that the right it asserted was a property interest in continued operation and potential future ownership of the clinic. This property right allegedly derived from the agreement that is at issue in this case.

State deprivations of property rights are cognizable under § 1983. *See Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). In *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court discussed the attributes of property rights in holding that employment contracts entered into by a state may confer on the employee interests that are protected under the Fourteenth Amendment from deprivation without procedural safeguards. The property interest in a state benefit, such as the one asserted here, attaches when a person has "more than an abstract need or desire for it . . . [and] more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement." *Roth, supra*, 408 U.S. at 577. There must exist "rules or mutually explicit understandings that support his claim of entitlement." *Perry, supra*, 408 U.S. at 601, *citing Roth, supra*, 408 U.S. at 577.

The procedural protection of property afforded by the Fourteenth Amendment "is a safeguard of the interests that a person has already acquired in specific benefits." *Roth, supra*, 408 U.S. at 576. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 518-19 (1978). In order to state a claim cognizable under § 1983 based on a right to future ownership, the Board had to show that the agreement created an entitlement—understood to be such by both it and the Commissioners—to run the clinic upon its attainment of economic self-sufficiency. That it failed to do.

The agreement on its face creates no absolute right in the Board to obtain exclusive control of the clinic. The

introductory portions of the agreement recite the Commission's desire to foster local ambulatory health care in medically underserved areas, and the Board's desire to independently operate the clinic. This portion of the agreement also notes the Board's need of the large capital investment and management assistance necessary to operate the clinic. To this end the Commission agrees in Clause One of the agreement to provide money and "its counsel in management and administration of the clinic until the point in time that the clinic has reached economic self-sufficiency and the Uptown Community Board requests complete independence from the Commission." There follows a one-sentence definition of the meaning of "economic self-sufficiency." *See* note 3, *supra*. Then the agreement continues: "Thus, the Commission shall have the right to relinquish its authority in the operation of the clinic . . . upon the demand and tender of the Uptown Community Board" of the debts owed to the Commission, or the Commission's forgiving the debts.

The parties agree that these are the critical passages in the agreement. The Board, as noted, contends that the agreement gives it an absolute right to operate the clinic on its own upon the attainment of self-sufficiency and the repayment or forgiveness of the debts. The language of the agreement, however, cannot be made to bear that interpretation.

The Board must *request* independence from the Commission. It "[t]*hus*" becomes the Commission's "right to relinquish its authority." (Agreement Clause One, emphasis added.) There would be no need for the explicit requirement that the Board must request its independence if the Board had an automatic right to control when other conditions were met. Indeed, the only *right* that is set forth in regard to the Board's exclusive operation of the clinic is that of the Commission to relinquish its authority under the agreement. The Board may request that the Commission so exercise its right, but the plain terms of the agreement do not require that the Commission comply.

Other language in the agreement upon which the Board relies for its interpretation includes the introductory portion that relates the Commission's interest in having locally operated clinics and the Board's desire to independently run one. The district court also pointed to a provision of the agreement that states "the ultimate goal [of the agreement is] ownership and control by the [Board]." This language merely expresses the goal of the agreement's signatories. This expression of a goal and the desire to attain it does not, however, rise to the level of an explicit mutual expectancy that the Board is *entitled* to acquire the clinic for its exclusive use upon meeting the agreement's conditions. *Roth*, *supra*, 408 U.S. at 577. *Cf. Bishop v. Wood*, 426 U.S. 341 (1976) (no explicit guarantee of continued employment in contract or under state statutes). The parties obviously entered the agreement with the hope that things would work out, the same way as the teacher and the University in *Roth* presumably entered the employment contract in that case with similar high hopes. But an intent to have the agreement succeed does not confer a property right to force the Commission to act as though it *had* succeeded, especially here, where the agreement on its face leaves the ultimate decision to the Commission. This interpretation of the agreement would permit the Commission, even after the clinic was currently self-sufficient, to determine in keeping with its own public responsibilities that to assure continued self-sufficiency in the future and the proper delivery of health care that it should continue at least for some additional time to maintain a share of control. Some of the evidence concerning the conduct of the present Board suggests the wisdom of the drafters of the agreement in leaving a share of discretion with the Commission in spite of the original high expectations of all the parties.

The final provision of the agreement to which the Board turns for support states that the "Commission will maintain and help to facilitate the development of the clinic until economic self-sufficiency is achieved." This vests no additional right in the Board, although the Board claims that the provision shows a guarantee of future ownership. The quoted provision makes explicit

that the Commission's financial responsibility ends when the clinic is able to sustain itself, and is directed at assuring assistance for expenditures that may arise in the course of the clinic's operation but which may not be provided for in the agreement. The provision does not say that the Commission's operation of the clinic must cease at that time. The physical placement of the provision within the agreement makes clear that it relates to financial considerations: it follows several provisions that deal with the lease and purchase of the building that houses the clinic. The provision does not suggest a requirement that the Board receive full ownership upon request.

Since the plain language of the agreement taken as a whole assumes a clear, unambiguous meaning that the Board did not have a protectible property interest in future operation of the clinic, there was no need to go beyond the agreement's text in order to interpret its meaning. *Goldblatt Bros. v. Addison Green Meadows, Inc.*, 8 Ill. App. 3d 490, 290 N.E.2d 715 (1972). We note, however, that the evidence presented at the hearing in this case and relied upon by the district judge does not conflict with the plain language of the agreement. For example, the notes of one meeting of the principals reads that the clinic "will lease the center from the bank until the community buys the building," which is said to show that it was intended for the Board to eventually own the clinic. To begin with, everyone agrees that the parties intended that the relationship would succeed and the Board would own the clinic. As we have concluded, however, that general intent does not show that the agreement conferred a protectible property interest in future ownership for § 1983 purposes, since the Commission retained the right to make the ultimate decision. Moreover, since the agreement itself required that the Commission assist the Board to buy the building, the meeting's notes are merely cumulative of the language in the agreement, which we have already stated does not demonstrate the asserted property interest.

The minutes from another meeting indicate that the Commission felt a duty to teach the Board how to administer the clinic so that the Board would be ready to

operate the clinic "when it becomes necessary." This merely conforms to what we have said before: the goal and hope of the parties to the agreement was that the Board would one day be able to own the clinic, and administrative training was appropriate to that end. This is insufficient to create a property interest cognizable under § 1983, since the parties' "intent" did not amount to a requirement that the Commission turn the clinic over to the Board: discretion to do so was reserved exclusively in the Commission.[6]

The district court stated that testimony of certain former Commissioners shows "that it was always contemplated and intended" that the Board would own the clinic. Commissioner Ayala's testimony merely says that it was intended that "all the clinics will eventually end up to be self-sufficient." Since self-sufficiency only established the point at which the Board was entitled to request its independence, but did not mandate that the Commission grant independence, Commissioner Ayala's testimony does not prove the Board's point.

The portion of Commissioner Fritzsche's testimony to which our attention is directed simply states that there are mutual promises in the agreement. While her testimony may go to whether or not the Commissioner thought a contract existed, it says nothing about what the nature of those promises is, and her other testimony

[6] The Board asserts that a document prepared by the physician responsible for patient care at Cook County medical facilities shows that self-sufficiency was a realistic goal, soon-to-be realized. In fact, the document merely presents a general "perspective" on how to go about achieving self-sufficiency and specifically notes that the clinic is operating at a $400,000 annual deficit. Since testimony taken in this case indicates that none of the Commission clinics was ever self-supporting, there could be no reasonable expectation based on past County practice that the change in ownership would be automatic. *See Perry, supra*, 408 U.S. at 602-03. And the Board's assertion in its brief that it would not have undertaken the work necessary to start the clinic unless it expected eventually to own the clinic merely suggests a unilateral expectation on its part, insufficient for § 1983 purposes to show a protectible property interest. *See Roth, supra*, 408 U.S. at 577.

makes clear that she did not think that one of the promises involved the Board's asserted automatic right to ownership of the clinic.[7]

An entitlement may be created by the operation of state law as well as by the terms of the agreement. *See Bishop, supra*, 426 U.S. at 344. Principles of Illinois law provide no basis for the Board's claim to procedural protections. The agreement specifies no termination date other than the time of the Commission's acquiescence to the Board's request for independence upon the attainment of economic self-sufficiency. "It has long been the holding of the Illinois courts that when an executory contract fixes no time for its operation, it is terminable at the will of either party," and without notice. *Kraftco Corp. v. Koblus*, 1 Ill. App. 3d 635, 640, 274 N.E.2d 153 (1973). In *Steinberg v. Kepper-Nagel Real Estate Investments, Inc.*, 14 Ill. App. 3d 619, 303 N.E.2d 46 (1973), the court concluded that a real estate sales contract containing a termination date of 180 days after the lifting of an apartment rezoning moratorium at some unidentified future time did not state a definite time limit to the agreement. In the absence of such a time limit, the executory contract was terminable at will. *Id.* at 622, 303 N.E.2d at 48.

The present case involves a situation analogous to that in *Steinberg*. The Board's asserted future "property right" depends upon the attainment of a tenuous goal not within control of either party to the agreement, namely, economic self-sufficiency. That aspect of the agreement, wholly executory and standing alone, would be subject to termination at will and without notice by either party under Illinois law. The absence of a right to a hearing under state law or the terms of the agreement

[7] Commissioner Fritzsche testified that "the whole agreement is based on the hope that such an agreement . . . can work, and as soon as the working relationship no longer is possible, I think that then you must have powers to undertake steps to safeguard the operation of the clinic." The Commission has maintained funding for the clinic, which is continuing to provide medical care to the Uptown community.

is fatal to the claim for § 1983 purposes. *See Bishop, supra*, 426 U.S. at 344-45.

The case of *Maimon v. Telman*, 40 Ill. 2d 535, 240 N.E.2d 652 (1968), cited by the district court to support its contrary conclusion, is inapposite. The *Maimon* case dealt with the question of whether or not a joint venture existed between the parties to an agreement. If a joint venture was found to exist, the agreement would be held to remain in force until its purpose was accomplished or no longer possible. As the Court indicated, however, joint ventures present a virtually unique circumstance in that respect. In other situations, such as partnership, the agreement would be terminable at will. *Id.* at 538, 240 N.E.2d at 655. In the present case, aside from a single conclusory allegation in the Complaint, the record does not suggest that the Commission and the Board were joint venturers. Since the agreement thus was terminable at will and without notice, the Board had no right to procedural protections, cognizable under § 1983, to assert against the Commission's decision to "divorce" the Board.

There are no "rules or mutually explicit understandings" that support the Board's claim of entitlement to future ownership of the clinic. *See Perry, supra*, 408 U.S. at 601. Nor does state law provide that an agreement for such future ownership could not be terminated without notice. *See Bishop, supra*, 426 U.S. at 344-45. The portion of the agreement relating to future ownership of the clinic, then, did not confer a property right on the Board so as to create federal jurisdiction under § 1983.

The Board's response to the County defendants' motion for a more definite statement alleges the Board's property right in the "continued operation of" the clinic. In support of the existence of such a property right[8] the

[8] Neither the parties nor the district court directly addressed the possibility that the allegation regarding a right to "continued operation" provides a basis for § 1983 jurisdiction. The allegation was addressed, however, in connection with the

(Footnote continued on following page)

Board points to its responsibilities under the agreement for the clinic's billing and collection activities, and for participation on the liaison committee established to make "major policy decisions" regarding the clinic.

It is true that under the agreement, the "Board is responsible for all billing and collecting." The Commission, however, is to provide "assistance until the clinic develops the capability to do its own billing and collecting independently." Moreover, the agreement states that the Commission is to establish the accounting procedures to be used, and that the Board must implement those procedures. The portion of the agreement that deals with billing and collecting does not create a property right in the Board for jurisdiction purposes any more than does the portion related to future ownership. Until the clinic "develops the capability" to bill and collect on its own, the agreement is clear that the authority to do so resides for all practical purposes with the Commission. Evidence presented at the hearing on this point supports the plain language of the agreement. In particular, the record shows that the Board took no part in billing or collecting procedures, and that the Commission declined to allow it to do so when the Board requested responsibility in the area. The record does not indicate that the Board raised the issue with the liaison committee, as it might be expected to do on a matter such as this. The Board only submitted a questionnaire to the committee seeking an accounting and a report of billing to aid in "an understanding of accounts receivable." The practice of the parties thus reflects the scope of the Commission's authority set forth in the agreement.

The Board's authority to participate on the liaison committee likewise is insufficient to establish a property right for purposes of stating a federal claim. Both parties retained veto power over any decision made by the committee, but this was a significant limit only on the

[8] *continued*
issue of whether the agreement constituted a contract, and that discussion provides ample basis for our consideration of the jurisdiction issue.

Board's potential authority under the agreement. The agreement explicitly states that the Commission's authority over administration of the clinic derives from its exclusive responsibility to employ personnel to fill the highest positions in the clinic, as well as from its participation on the liaison committee. By contrast, the Board may exercise its administrative responsibilities *only* through its participation on the liaison committee, the decisions of which are, of course, subject to veto by the Commission. Thus, the agreement establishes that the Board's only viable interest in the operation of the clinic is what the Commission grants it by declining to veto liaison committee decisions. The Commission, on the other hand, retains authority to operate without input from the Board.

Whatever rights the agreement grants to the Board, they are not property rights cognizable under § 1983 as alleged in the Complaint.

The Federal Defendant

The district court has not yet dealt with the adequacy of the claims presented against federal defendant Harris. But pendent jurisdiction on the state claims against the County defendants could not be exercised absent a substantial federal question. In light of our conclusions on the federal claims against the County defendants we must address the allegations against Harris. The peculiar posture of this case thus makes it necessary to decide whether the Complaint states a substantial federal claim even though Harris is not a party to this appeal in the usual sense.[9]

Count One of the Complaint alleges that "HEW representatives have violated" unspecified statutes that created NHSC, "the regulations, rules and guidelines" HEW enacted to administer NHSC programs, and "the terms of the grant or assignment of NHSC personnel" to

[9] Defendant Harris submitted a brief in this appeal styled as a "Statement of Position." Government counsel presented Harris's position at oral argument.

the clinic. Counsel for Harris requested a more definite statement, contending that these vague and conclusory allegations fail to specify adequately the basis of the Board's complaint against HEW. The district court agreed and ordered the Board to respond by May 5, 1980 to each of the very specific requests for explanation presented by HEW. The Board is in default of that order, never having tendered a response.

The district court was correct in determining that the allegations were indefinite. While it is true that "notice pleading" is an integral part of the federal rules governing pleading, it still is necessary that *something* be stated that apprises a defendant of the substance of the allegations. *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *French v. Corrigan*, 432 F.2d 1211 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971); 2A MOORE'S FEDERAL PRACTICE ¶8.17 [4.-1]. If the simple statement that HEW violated unspecified regulations and statutes is sufficient to state a claim in this context, then virtually every complaint filed against the national government, however meritless, would confer jurisdiction over pendent claims, placing undue strain on the concept of federalism. This concern is especially significant in this case since even the extensive factual allegations in the Complaint do not shed light on which aspects of HEW's conduct relate to Count One, and which relate to fiduciary and other obligations allegedly breached under other Counts. Notice pleading still requires fair notice. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957). Count One is not sufficiently definite to state a substantial federal claim.

The allegations in Count Two that HEW violated the Board's right to due process under the Fifth Amendment and in concert with the Commissioners likewise fail to state an adequate claim. The Board is in default of the district court's order to more clearly state its claims against the federal defendant in this Count. Nevertheless, taking the Board's answer to the County defendants' request for a more definite statement on Count Two as treating the thrust of HEW's request, it is

clear that the allegations are inadequate. The property right alleged to exist in the agreement has no more substance when asserted against the federal defendant than when aimed at the Commissioners. Count Two fails to state a federal claim.

The vague allegation in Count Four that "HEW acting by and through its duly authorized agents and employees has participated in [the Commissioners'] breach of trust" is insufficiently definite to state a claim. The district judge so concluded when he directed the Board to amend its Complaint in response to Harris's motion to make more definite the allegations concerning the manner in which Harris participated in the alleged breach of trust and the specific basis of HEW's fiduciary obligations to the Board. The Board declined to comply with the district court's order. The Board's response to the County defendants' request for a more definite statement does not elucidate the nature of Harris's participation. The allegations that the Board thus places before us fail adequately to specify the acts of which the Board complains, and fail to state a claim upon which federal jurisdiction may be grounded.

IV.

The Complaint fails to allege a substantial federal claim. The district judge therefore had no jurisdiction to decide the Board's pendent claims. The district court did not consider whether the County defendants breached fiduciary duties owed to the Board in the absence of the asserted property interests. Even though some state claims were heard below, and it is our usual practice in that situation to reach the merits of the state claims, *see Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972), we decline to do so here where the record is inadequate to make a determination and the question has not been briefed on appeal. Accordingly, the district court's decision is reversed and remanded with directions to dismiss the Complaint without prejudice to the

Board's bringing the state claims alleged therein in state court, where they belong.[10]

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[10] On February 26, 1981, the County defendants filed a motion to stay the district court's judgment. In light of our disposition of this case, we deny the motion as moot.

USCA 4969—Midwest Law Printing Co., Inc., Chicago—4-21-81—350

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

RECEIVED
JUN 04 1981
CHAPMAN AND ROYCE, LTD

May 29, 1981.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. DUDLEY B. BONSAL, Senior District Judge*

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois not-for-profit Corporation, Plaintiff-Appellee, vs. THE BOARD OF COMMISSIONERS OF COOK COUNTY and the COUNTY OF COOK, Defendants-Appellants, vs. PATRICIA ROBERTS HARRIS, in her capacity as Secretary of the Department of Health and Human Services, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80-C-32 Stanley J. Roszkowski, Judge.

No. 80-2226

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by counsel for the plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

Appendix

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-208

In the
Supreme Court of the United States

OCTOBER TERM, 1981

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois Not-For-Profit Corporation,

Plaintiffs-Petitioners

vs.

RICHARD SCHWEIKER, in his official capacity as SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES and THE BOARD OF COMMISSIONERS OF COOK COUNTY and THE COUNTY OF COOK,

Defendants-Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. HARTE
111 West Washington Street
Chicago, Illinois 60602
(312) 726-5015
Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois not-for-profit corporation,	)	
Plaintiff,	)	
vs.	)	No. 80 C 0032
PATRICIA ROBERTS HARRIS, in her official capacity as Secretary of the Department of Health, Education, and Welfare of the United States; THE BOARD OF COMMISSIONERS OF COOK COUNTY, a Municipal corporation; and THE COUNTY OF COOK, a Municipal corporation	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court having heard the testimony of witnesses, having read and considered exhibits received into evidence, having heard the arguments of counsel and considered the memoranda filed in this matter, hereby enters its findings.[1]

---

1 On August 12, 1980, judgment was entered in favor of the plaintiff declaring the Agreement between the parties to be valid, enforceable and binding upon the defendants. The defendants were ordered restrained from interfering with the lawful contractual rights of the plaintiff. The court also made

(Footnote continued on following page.)

I. INTRODUCTION

The plaintiff organization, Uptown People's Community Health Services Board of Directors (hereinafter "Board") is a duly registered not-for-profit corporation. The defendant County of Cook, Illinois (hereinafter "County")[2] is a unit of local government and a body politic. The defendant Board of Commissioners of Cook County, Illinois is the legislative arm of the County. The Health and Hospitals Governing Commission (hereinafter "Commission") was a legislatively created entity established to provide certain health care services in the County. The Commission was created in 1969 and was legislated out of existence as of December 1, 1979. Defendant Patricia Roberts Harris, sued as the Secretary of Health, Education, and Welfare (hereinafter "HEW"), is a named defendant who appeared and filed responsive pleadings to the complaint but did not participate in the hearing before the court.

The Commission oversaw the provision of health care at Cook County Hospital, Oak Forest Hospital, Cermak Memorial Hospital, and various out-patient clinics in Cook County, Illinois. Beginning sometime in early 1977, persons from the Uptown community of Chicago began to meet with officials from the Commission to discuss the possibility of opening an out-patient medical clinic in the Uptown area. On January 20, 1978, the Board was established. In preparation for applying for a National Health Service Corp. (NHSC) assignment of medical personnel from HEW, the Board performed a survey

---

[1] *continued*
the following statement: "Because of the necessity of a speedy resolution to this dispute, the findings that would normally accompany this Judgment Order and Decree shall be entered in the near future. They shall be wholly consistent with this order." This order constitutes those findings.

[2] Throughout this order, when the court refers to the "County", it is referring to both the County of Cook and the Board of Commissioners of Cook County unless otherwise noted.

in order to establish that the Uptown area was a medically underserved area as defined by HEW regulations.

On February 19, 1978, the Board, as applicant, filed an application for NHSC personnel. The drafting of the application appears to have been a joint effort by the Board and Commission personnel. Before HEW would approve an NHSC assignment of personnel, its regulations required that the Board and the Commission enter into either a written agreement of understanding or a contract. HEW subsequently approved the application, contingent on the Board reaching an agreement with the Commission for the establishment of the facility in Uptown.

In September, 1978, the Board and the Commission entered into a written agreement (hereinafter "Agreement") relating to the operation of the facility, named the Uptown People's Health Center (hereinafter "Center"). Pursuant to the Agreement, the Commission was to provide to the Board start-up monies for capital expenditures and other expenses necessary for the operation of the Center and counsel in the management and administration of the Center as a health facility. A substantial portion of the cost of operating the Center was borne by the NHSC grant. Professional staff were to be provided by both the Commission and HEW.

Under the Agreement, the Board and the Commission created a "Joint Community Board Commission Liaison Committee" (the "Liaison Committee") comprised of five representatives of the Board and five representatives from the Commission. The Liaison Committee was assigned responsibility for all the major policy decisions governing the Center and its staff. Liaison Committee decisions, however, were subject to approval by both the Community Board and the Commission before implementation. This relationship, under the terms of the Agreement, was to continue in force until the time when the Center reached economic self-sufficiency, and the Board requested complete independence from the Commission in the operation of the Center.

Plaintiff, on January 3, 1980, filed its six-count complaint in this action. The plaintiff is seeking a declaratory judgment finding the Agreement valid and binding and an order enjoining the conduct of those persons who would "destroy that agreement and appropriate for their own use the subject matter of that Agreement, namely, the Center." Jurisdiction was invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. §§ 2201, 2202, 42 U.S.C. §§ 1983, 1985(3), and the Fifth and Fourteenth Amendments to the United States Constitution.

Plaintiff charged both of the County defendants with (1) violations of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985(3) (Count II); (2) a breach of the agreement between the Community Board and the Commissioners (Count III); (3) a breach of trust obligations owed to the Community Board (Count IV); (4) a violation of Article I § 10 of the U.S. Constitution (Count V); and (5) a violation of Article I § 2 of the Illinois Constitution of 1970 (Count VI). Plaintiff charged the federal defendant with (1) violations of various statutes, regulations, rules and guidelines governing HEW's administration of the NHSC Program (Count I); and (2) violations of the Fifth Amendment (Count II).

The County defendants filed a motion to dismiss on the grounds that 1) the complaint fails to state a claim upon which relief may be granted; 2) no enforceable contract exists; 3) that the Health and Hospitals Governing Commission terminated the agreement in question for good cause; 4) that by December 1, 1979 when Cook County took over the operation of the Health and Hospitals Governing Commission, the agreement in question had already been dissolved; 5) that Cook County and the Board of Commissioners have unfettered discretion in funding and refusing to fund projects with tax monies; 6) that the County defendants are immune from suit as they have acted in their legislative capacity; 7) that no federal claim has been established against the County defendants; 8) that plain-

tiffs by their actions of using the facilities for their personal benefit have violated their fiduciary duty to defendants thus entitling defendant to terminate the agreement for good cause; 9) that the allegations of the wrongful acts by defendants are too vague or conclusory to state a claim; and, 10) plaintiffs reliance on unidentified federal statutes cannot be the basis for a federal claim.

In this court's order of March 27, 1980 denying the County's motion to dismiss, the issues raised by the defendant were not dealt with substantively. Rather, it was decided that "the case is not ripe for disposition at this time." It was felt that a full hearing would put the court in a better position to rule on the issues raised. The development of the factual record at the hearing was such that rulings are now able to be made.

II. JURISDICTION

The plaintiff has alleged various bases for the court to exercise its jurisdiction in this case. Each of them will be examined separately.

A. FEDERAL QUESTION STATUTE

Jurisdiction against defendant Harris is alleged through 28 U.S.C. § 1331(a):

> The district courts shall have original jurisdiction of all civil actions wherein the matter...arises under the Constitution, laws, or treaties of the United States....

The plaintiff has alleged that defendant Harris' official conduct has violated the Fifth Amendment, thus giving this court jurisdiction because the matter "arises under the Constitution." *See also, Gautreaux v. Romney*, 449 F.2d 731, 734 (7th Cir. 1971).

The hearing was limited, by stipulation, to issues dealing

with the County defendants.[3]

B. DECLARATORY JUDGMENT ACT

The plaintiff has alleged that jurisdiction is invoked under 28 U.S.C. §§ 2201, 2202. Both of those sections merely create a federal remedy when "a case of actual controversy within its jurisdiction" is brought in this court. They do not confer jurisdiction, but rather give this court the power to "declare the rights and other legal relations of any interested party seeking such declaration...." In this case, the court has jurisdiction under U.S.C. § 1343, as will be discussed later. The validity and enforceability of the Agreement will be determined through the power vested in this court by 28 U.S.C. §§ 2201, 2202.

C. CIVIL RIGHTS STATUTES

Plaintiff sets out in its complaint a cause of action under 42 U.S.C. § 1983 against the County for unlawful deprivations of plaintiff's property interests without due process of law. This deprivation allegedly has taken place "under color of state law." While § 1983 creates a federal cause of action, jurisdiction itself is provided through 28 U.S.C. § 1343. The court will address the jurisdictional aspects of the § 1983 violations.

The threshhold question in any due process case is whether the alleged deprivation was the product of state action. The question of state action must be answered as a jurisdictional matter, before considering any other issues. *Robinson v. Bergstrom*, 579 F.2d 401, 404 (7th Cir. 1978). In this case, the com-

---

[3] The parties agreed to this arrangement, and it in no way constituted a waiver of the plaintiff's claims against the federal defendant. Furthermore, in no way did plaintiff's decision to participate in a hearing involving only the County defendants constitute an admission that federal jurisdiction was lacking.

plained of actions were taken by Commission members and by County representatives. All of these people were employees of clearly state-related instrumentalities. The general rule is that "an individual's conduct is engaged in under color of law if clothed with the authority of the state and purporting to act thereunder, whether or not the conduct complained of was authorized." *Robert v. Acres*, 495 F.2d 57 (7th Cir. 1974), citing *Monroe v. Pape*, 365 U.S. 167 (1960), and *Screws v. United States*, 65 S.Ct. 1031 (1944). In this case, Commission members were not acting individually, wherein arguments as to scope of authority might lie. Rather, they were acting in their official capacities, "clothed with the authority of the state." Quite clearly, state action is involved here.

Having determined that state action exists, this court can properly exercise its jurisdiction to consider whether the plaintiff has a protectible property interest. The subject of what constitutes a protectible property interest was discussed thoroughly in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined

> by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 2699 (1972), the Court again spoke on property interests:

> ..."property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit...

In *Perry*, a written contract with an explicit tenure provision "clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient cause is shown."

It must be remembered that the Fourteenth Amendment's protection of property has never been interpreted to safeguard only the rights of undisputed ownership. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Rather, it has been read broadly to extend protection to "any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). A reasonable reading of the Agreement will show that the Board was entitled to eventual undisputed ownership of the Center, and that the Board has a significant property interest entitled to Constitutional protection. An analysis of the nature of this property interest follows.

In this case, it is the Agreement that creates a protectible property interest. Quite clearly, the plaintiff has a protectible property interest in the present operation of the Center. Prior to self-sufficiency, the plaintiff has the right to participate in

the administration of the Center, including the dispensation of a 1% discretionary fund, through its participation in the Joint Liaison Committee.

The fact that the Board has a "legitimate claim of entitlement" to eventual ownership of the Center is a point that the defendants hotly dispute. Defendants assert that plaintiff's alleged property interests involve no more than an expectancy or anticipated interest in the Center at some unknown date in the future.

Initially, the court will look to the Agreement to see if the plaintiff is justified in feeling it has "a legitimate claim of entitlement" to the Center, rather than just "a unilateral expectation of it."

Paragraph 1 of the Agreement reads in relevant part:

> The Commission shall provide the start-up monies needed...until the point in time that the clinic has reached economic self-sufficiency and the Uptown Community Board requests complete independence from the Commission... Thus, the Commission shall have the right to relinquish its authority in the operation of the clinic, thereby making the clinic an independent operation of the Uptown Community Board, upon the demand and tender of the Uptown Community Board of the current market value of the lease and equipment unless those debts are retired or forgiven.

Defendants argue that because they only have the *right* to relinquish their authority in the Center, rather than an *obligation* to relinquish it, no entitlement of ownership exists. If the court were to read this portion of the Agreement in a vacuum, it may be inclined to agree with the defendants. However, if that section is considered along with the rest of the Agreement,

the extensive testimony heard, and the voluminous documents proferred, the only conclusion that can be reached is that the plaintiff quite reasonably expected to be given ownership of the Center upon meeting the self-sufficiency requirements.

There is overwhelming evidence in the record that the Commission fully intended to turn over control of the Center to the Board when the self-sufficiency requirements were met. This evidence took several forms. Significantly, the rest of the language of the Agreement itself suggests that the "right" to relinquish control is another way of saying the Commission *will* relinquish control. For instance, paragraph 3, page 1 of the Agreement reads: "Whereas, the Uptown Community Board is desirous of operating the Uptown People's Health Center...independently and thus desires to develop self-sufficiency in operations...." Paragraph 1, page 2 reads: "Whereas, the Commission believes in the concept of efficiently managed community owned and controlled ambulatory health care facilities...." Paragraph 2, page 2, reads: "...the [Board] and the Commission hereby agree to the operation of the [Center], with the ultimate goal being ownership and control by the [Board]...." Paragraph 1, page 3 reads: "The Commissions provision of funds for the start-up costs...[are] to be repaid after acquisition of the clinic by the Board." Paragraph 3, page 6 reads: "The Commission will maintain and help to facilitate the development of the clinic until economic self-sufficiency is achieved."

Nowhere is there any mention of the possibility that control will not be turned over upon the Center's attaining economic self-sufficiency. The above-quoted language clearly manifests the intentions of the parties. That intent was to turn over the Center to the Board when self-sufficiency was attained. The language of the entire Agreement makes that intent unequivocal.

The testimony of both Walter Coleman and Helen Shiller revealed that the Board members always intended that the Board would ultimately own and control the Center, and the

Agreement was a manifestation of that intention. Even more significantly, however, a former member of the Commission, Philip Ayala, testified that it was always contemplated and intended by the Commission that the Board would have the right to and would in fact own the Center. The testimony of fellow Commission member Sybille Fritzche confirms that the Commission so intended.

Minutes from the Commission's Community Planning Committee also reflect the fact that the Commission intended for the Board to eventually take over the Center. The minutes of the April 12, 1978 meeting read: "We will lease the center from the bank until the community buys the building." (Plaintiff's Ex. B11). That is an unconditional statement that evidences an intent that the Board would eventually own the Center. In fact, the Community Planning Committee felt that the Commission had the responsibility to teach community boards so as to prepare them for the time when they would take over the operation of the Center. (Plaintiff's Ex. B19, p.4).

Thus, it is very clear that the plaintiff has a protectible property interest in both the present operation of the Center, and in the eventual ownership of it. This property interest is created by the Agreement. There is a mutually explicit understanding between the parties that the Board is entitled to participate in the present operation of the Center and is entitled to eventually own it. For the County to argue otherwise denies the realities evidenced by the clear language of the entire Agreement and the clear testimony of the witnesses. A protectible property interest for due process purposes exists in this case.

The question the court is now faced with is how much farther in its analysis of the civil rights violation must it go. The hearing was held for the purpose of deciding the validity and enforceability of the Agreement. While the parties may now argue that civil rights violations may or may not exist, the plaintiff in its post-trial brief (p.12) succinctly sets forth the

issues addressed at the hearing:

> Essentially, three basic issues have been presented to the Court as to the County:
>
> 1. Is the Agreement between the Community Board and the Health and Hospitals Governing Commission a valid, binding and enforceable Agreement?
>
> 2. Did the County and its agents and employees, engage in conduct which wrongfully interfered with the plaintiff's rights under the Agreement?
>
> 3. Was the wrongful conduct of the defendant somehow justified by some alleged breaches of the Agreement by the plaintiff?

Issues 1 and 3 most certainly are contract issues. Issue 2, while arguably charging some kind of due process violation, was also presented to the court at the hearing as a contract issue. That issue was whether the County breached the Agreement. In the final analysis, the question with which the court was presented at the hearing was whether a valid contract exists, and if so, whether anyone breached it. The due process violations, which may naturally flow from a contractual breach, were never really the focus of the inquiry at the hearing.

By not ruling on the specific due process theory advanced by the plaintiff in its brief, a jurisdictional issue is raised as to whether the pendent contract claims can be heard. For the court to entertain the state claims, the federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966). When there is jurisdiction because of a sub-

stantial federal claim, there is power to hear pendent claims when they derive from a common nucleus of operative fact and the claims are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding. *Id.* The due process claims that are the basis of the federal jurisdiction are inextricably intertwined with the contract issues and clearly derive from a common nucleus of operative fact. Also, it would be ludicrous to expect the plaintiff to not try all the claims in this one proceeding. For any court to duplicate all of the time already put into this case would be a gross waste of judicial resources. Thus, the state claims are truly pendent. Moreover, the Supreme Court has encouraged the use of pendent jurisdiction and has limited a district court's discretion to reject it in *Hogans v. Lavine*, 415 U.S. 528, 545-546 (1974), where it said: "Given the advantage of economy and convenience and no unfairness to litigants, [the doctrine] contemplates adjudication of these [pendent] claims." This is particularly true where the district court must decide pendent claims first. See, e.g., *Almenares v. Wyman*, 405 U.S. 453 F.2d 1075 (2nd Cir. 1971), *cert. denied*, 405 U.S. 944 (1972), and *Williams v. Wohlfemuth*, 540 F.2d 163 (3d. Cir. 1976).

The due process claims satisfy the substantiality test. Federal claims will satisfy the substantiality requirement for pendent jurisdiction purposes when they cannot be dismissed on the face of the pleadings alone. *In re Union National Bank & Trust Co. of Souderton, Penn.*, 298 F.Supp. 422 (D.C. Pa. 1969). So long as the federal claim is not clearly unsound or obviously without merit it is sufficient to confer jurisdiction over the non-federal claim. *Id.* The ultimate disposition that may be made of a federal claim is immaterial in determining whether it is sufficiently substantial. *Rambaugh v. Winifrede R. Co.*, 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929, 85 S.Ct. 322 (1964). *See also, International Association of Firefighters Local 2069, City of Sylacauga*, 436 F.Supp. 482, 489 (N.D. Ala. 1977).

In this case, the plaintiff's federal claims are so substantial

that they have nearly been proven at a hearing where the focus was not even on such claims. As pointed out, state action is involved and a protectible property interest exists. The question of whether the process that is due was afforded by the County will not be decided by the court as the resolution would go beyond the scope of the hearing. In fact, in a minute order dated May 6, 1980, the court specifically noted that the hearing would only address "the question of declaratory and preliminary and permanent injuctive relief." The minute order of April 25, 1980 ordered the parties to submit a statement of issues surrounding the hearing "on the contract in dispute."[4]

D. POLITICAL QUESTION

The County has argued that the issues raised by the plaintiff constitute a "political question, not capable of resolution in a court of law." This argument is really an adjunct to the claim in the motion to dismiss that the County has unfettered discretion in funding and refusing to fund projects with tax monies. It is well established that the federal courts will not adjudicate political questions. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). In *Baker v. Carr*, 369 U.S. 186 (1962), the Court noted that political questions are not justiciable primarily because of the doctrine of separation of powers within the federal government. The Court concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

---

[4] The court is in no way suggesting that further hearings be held. The rulings on the contract issues should put the parties in a position to resolve the remainder of the lawsuit. It should be rememberd that the hearing was held not just as to certain defendants, but also only as to certain claims. Thus, only Count III of the complaint, as it relates to the County defendants, is being decided in this order.

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 369 U.S. at 217.

This case involves none of those situations. The court is not dictating to the County how it must spend its funds. Rather, this court is making clear to the County that when it, like private parties, enters into a valid and enforceable contract, it must live up to the obligations imposed in it. Failure to do so not only results in a simple breach of the contract, but also carries with it the possible constitutional ramifications because of the property deprivation which may occur. Because of the nature of the parties involved, and because of the controversial characteristics of any dispute involving the provision of health care services, this case obviously has "political" aspects to it. But the term "political" is only used in its generic sense, because a "political question," as defined by the Supreme Court, does not exist here.

II. CONTRACT ISSUES

Upon the finding that the plaintiff has raised a substantial federal claim against the county, and upon finding that the state claims are pendent, the court will examine the state contract law issues raised.

It should be noted at the beginning of this discussion that it was the County who originally prepared the Agreement. Ambiguities in a contract are construed most strongly against the party who wrote it. As observed in *Donahue v. Rockford Showcase & Fixture Co.*, 87 Ill.App.2d 47, 230 N.E.2d 278 (2nd Dist. 1967), "The contract will be construed most strongly against the party who prepared it for the reason that he chose the words to be used and is therefore more responsible for the existence of ambiguity." *See, also, Pescaglia v. Gianessi*, 9 Ill.App.3d 582, 295 N.E.2d 148 (2d Dist. 1973). Keeping that general principle in mind, the court will consider the County's arguments.

A. COMMISSION AUTHORITY TO ENTER INTO CONTRACTS

The County defendants claim that the Agreement between plaintiff and the Cook County Health and Hospitals Governing Commission is prohibited and null and void under the *Counties Act*, Ill.Rev.Stat., ch.34, §§ 951, 2104. Section 2104 prohibits the County Board from making contracts requiring expenditures in any year in an amount above that provided for in the annual budget for that fiscal year. Section 951 prohibits the Cook County Board of Commissioners from delegating to anyone the power to enter into any contracts involving expenditures in excess of $2,500.00. The County contends that the Cook County Health and Hospitals Governing Commission acted outside of the scope of its authority when it entered into the Agreement.

Upon review of the Counties Act, it is clear that their limitations refer only to the activities of the Cook County Board of Commissioners. The signatory to the Agreement, the Commission, was an entirely separate and independent entity created

under Ill.Rev.Stat., ch.34, § 5011 *et seq.* (1977). No limitations such as those imposed on the Board of Commissioners were placed on the powers of the Commission. Rather, the powers given the Commission were quite broad:

> The Commission, as agent to the County in which the Commission exists and without further authorization from that County or the Board of Commissioners thereof, shall have and exercise on behalf of that county, the following powers...to form agreements for the provision of needed health services with public or private non-profit hospitals or health care facilities within the county...; to make and enter into contracts to accomplish any or all of its purposes....

The agreement that the Commission entered into was a proper exercise of its authority as outlined above. Moreover, it is not restricted by either § 2104 or § 951 because those sections *by their express terms* only apply to the County Board (Board of Commissioners). Finally, the Governing Commission was an independent body created by the legislature for a specific purpose. The extensive statutory authority granted the Governing Commission in Ill.Rev.Stat., ch.34, § 5011 *et seq.* (1977) reflects this independence. The County's objections on this point are without merit.

B. TAKEOVER STATUTE

The County takes the position that the Agreement entered into by the Governing Commission is beyond the present statutory authority of the Board of Commissioners, and therefore the Board of Commissioners cannot be bound by the Agreement.

By statute, the Health and Hospitals Governing Commis-

sion's existence was terminated as of December 1, 1979. The Board of Commissioners took over the rights, duties and obligations of the Commission. The "takeover" statute, P.A. 81-1197 § 3, became effective November 30, 1979 and amended Ill.Rev.Stat., ch.34, § 5020 by providing:

> The Board of Commissioners shall have and exercise all rights, powers, duties heretofore exercised by the Commission. All books, records, papers, documents, property, real and personal, unexpended appropriations and pending business in any way pertaining to the rights, powers and duties of the Commission shall be transferred and delivered to the Board of Commissioners. *All rights, duties and obligations of the Commission shall become the rights, duties and obligations of the Board of Commissioners.* (Emphasis added.)

When the statutory language is so clear, there can be little argument on the issue. Quite clearly, the Board of Commissioners is liable for any obligation incurred by the Governing Commission. One such obligation is the Agreement, and the Board of Commissioners has the same responsibilities under that Agreement that the Governing Commission had. Obviously, the legislature cannot "pass any law impairing the Obligation of Contracts" (Article I, § 10 of the Constitution of the United States). Common sense also would tell us that the legislature cannot by a simple deft stroke of its pen wipe out legal and enforceable obligations of the state or County.

C. CONSIDERATION

Defendants contend that the Agreement is not supported by consideration. The essence of consideration is legal detri-

ment that has been bargained for, and exchanged for, a promise. Consideration for a promise has been defined in the *Restatement of Contracts*, § 75 (1932) as: (a) an act other than a promise, or (b) a forebearance, or (c) the creation, modification or destruction of a legal relation or a return promise bargained for and given in exchange for the promise. Illinois courts have recognized that mutual and concurrent promises afford sufficient consideration for the support of each other. *Leisure v. Smith*, 13 Ill.App.3d 1070, 302 N.E.2d 177 (5th Dist. 1973). *See also, Nathan v. Leopold*, 108 Ill.App.2d 160, 247 N.E.2d 4 (1st Dist. 1969).

In this case, each party to the Agreement made certain covenants, including: (1) the Commission's covenant to provide start-up monies and counsel in the management of the Health Center, (2) the creation of a Joint Community Board-Commission Liaison Committee responsible for the making of policy decisions subject to the approval of the Board and the Commission before implementation, (3) the Community Board's administrative responsibilities via its participation in the Joint Liaison Committee, and (4) the Community Board's responsibility for all billing and collection.

There is absolutely no question in this court's mind that significant contributions were made by the Community Board both in the operation of the Center and in helping to put it in operation. These contributions included: development of outreach programs, conducting financial interviews, applying for federal funds, making the Center accessible to the community, orientation of new patients, marketing the Center, and bringing ideas to the Joint Liaison Committee. The Community Board acted to its detriment in performing these services. Clearly, its actions were taken in reliance on promises made in the Agreement by the County, and constitute legal consideration for the Agreement.

D. CERTAINTY OF TERMS

The County claims that the Agreement is not a valid con-

tract because only the responsibilities of the Commission are clearly delineated. The County also argues that the effect of the self-sufficiency clause is uncertain. In making that argument, the County restates much of its previous argument regarding the "right" versus the "obligation" of the Commission to turn over ownership of the Center to the Board upon self-sufficiency being reached.

The argument that only the responsibilities of the Commission are delineated is simply in error. The Board's responsibilities as to Liaison Committee representation (Agreement, p. 3, 4, ¶¶ 3, 5), and billing (Agreement, p. 5, ¶ 8) are set forth with the same particularity as the Commission's responsibilities regarding administrative authority. The question of the supposed ambiguity in the self-sufficiency clause was discussed at length when the court earlier found that a protectible property interest exists. The discussion there is obviously applicable here, and it will not be restated.

The County argues that no definite termination date is set in the Agreement. As noted by both parties, the rule in Illinois is that "if no date is fixed by the contract of joint adventure for its termination, the agreement remains in force until its purpose is accomplished, or until such accomplishment has become impracticable." *Maimon v. Telman*, 40 Ill.2d 535, 538, 240 N.E.2d 652, 655 (1968). The purpose of the Agreement, as previously stated, is for the Center to become self-sufficient. If the Agreement does not include a definite termination date, this court can imply a reasonable time for performance. The Center should at least be allowed the original term (five years) of the lease on its building to establish its independence. The acknowledged goal of both parties is for the Center to become self-sufficient. Thus, it would appear that an agreement on this point can be reached.

The County argues that the alternative stated in *Maimon*, that is, "or until such accomplishment has become impracticable" should be applied, since self-sufficiency is impossible at this time. It is apparent to the court that, in order for the

Center to become self-sufficient, it must have the contractually guaranteed cooperation of the County. It is unconscionable for the County to argue that the Agreement may be terminated because its goal is impracticable, when it is the County's own deliberate acts that are contributing to and causing any alleged impracticability in the accomplishment of that goal.

In view of the fact that it was the County who drafted the document, this court rejects the County's argument that the terms of the Agreement are uncertain.

E. MUTUALITY

The County contends that the Agreement does not bind the Board to do anything. It is argued that nothing in the Agreement obligates the Board to request independence or tender the value of the lease. Thus, the obligations of the Board are illusory and the Agreement lacks mutuality.

It appears to the court that the obligations involved in the Agreement contemplate a good faith effort on the part of both parties to achieve the ultimate goal of the Agreement, that is, the ownership and control of the Center by the Board. It is unrealistic for the County to suggest that, in order for mutuality to exist, the Agreement must "require" the Board to request independence. The independence and self-sufficiency of the Center is the *goal* of the Agreement. The parties are obligated by the terms of the Agreement to make every effort to achieve that goal.

The court finds that there is mutuality of obligation and that a valid and enforceable contract exists between the parties.

F. BREACH OF THE AGREEMENT BY THE COUNTY

The County, through its representatives, clearly took certain actions which amounted to breaches of the Agreement. The principal representatives involved were Dr. Ronald Shansky, the medical director of the Center, and Dr. James G.

Haughton, the Executive Director of the Commission.

It is clear from the evidence presented at trial that Dr. Shansky, as medical director of the Center, owed a fiduciary duty of loyalty to the Board as well as to the County. It was his responsibility to implement the policy set by the Joint Liason Committee and to act in the best interest of the Center. Any actions which would tend to undermine the efforts of either the County or the Board to operate the Center would be a breach of that duty.

The evidence has shown that, as the negotiating officer of the Center in the grant application process, Dr. Shansky breached his duty of loyalty to the Board by compromising its authority with several of the funding grantors. Dr. Shansky was aware that, in order for the Center to become self-sufficient, it was necessary for the Board to be the grantee of the various grant applications. Notwithstanding that fact, the record shows that Dr. Shansky compromised the authority of the Board in at least one instance by communicating to HEW the fact that he perceived problems with the Board's ability to function. Without the Board's knowledge, he engaged in a course of conduct which seriously compromised the Board's chances of receiving various HEW grants.

Dr. Shansky also failed to act in the best interests of the Center when he arranged a closed meeting of the members of the Center's staff to discuss the Family Health Plan presented by the Board. At that time, Dr. Shansky and the staff discussed various complaints they had about the Board and Dr. Shansky subsequently circulated a petition urging that the Board be reconstituted or dissolved.

The Agreement provides for a mechanism whereby legitimate objections to Board proposals can be heard and resolved (the Liaison Committee). It was Dr. Shansky's duty to employ that mechanism. His failure to do so is another example of his total lack of regard for his obligations to the Board.

Dr. Haughton breached the Agreement when he unilaterally "divorced" the present Board from the Center. By his ac-

tions, Dr. Haughton prevented the Board from receiving an Urban Health Initiatives Grant.

Dr. Haughton essentially "froze out" the present Board and started taking steps to form a new one. These actions were in breach of the Agreement and, as will be discussed later, were in no way justified on the alleged grounds of wrongful conduct on the part of the Board.

It is apparent from the record in this case that the medical staff and administrators resented the Board's attempts to influence policy decisions with respect to governing the Center. Rather than using the Liaison Committee to resolve their differences, however, the staff interfered with the Board's grant application procedures and, ultimately, attempted to dissolve the entire Board.

The actions of Drs. Shansky and Haughton were not in the best interest of the Center and represent a breach of the Agreement.

G. BREACH OF THE AGREEMENT BY THE BOARD

Various actions of the Board and its members are alleged by the County to have constituted breaches of the Agreement. Most notable among these alleged breaches is the alleged use of the Center by various Board representatives for personal political purposes. While there appeared to be some organized and arguably political activity surrounding the creation of the Center itself, it is unlikely that all such activity could have been avoided. More significantly, however, none of the evidence offered at trial indicated in any way that the provision of health care was ever compromised or interfered with because of political activities of the plaintiff.

It should be noted that Board member Helen Shiller was extremely conscious of the potential appearance of impropriety which would occur if she remained on the Board during her aldermanic campaign. To that end, she took a leave of absence from the Board during that period. There was never any show-

ing that any of the staff at the Center were forced to campaign for Shiller. Moreover, voluntary participation in a political campaign is both a right and privilege which may not constitutionally be prohibited or compromised except in certain limited instances, none of which are present here.

Many arguments were made at the hearing concerning the activities of the advocates. It is important to note that they are strictly volunteers performing a public service. Any of the problems supposedly created by them appear to be of a minor or even petty nature. Certainly none of these problems rise to the level of constituting a breach of the Agreement. The County's principal objection to the advocates concerns the lack of definition and understanding of the roles they are to play. Again, while the Agreement specifically provides for discussion at the Liaison Committee level in order to resolve such disputes, this avenue was apparently not pursued.

The County's contention that the advocates were "spies" for Walter Coleman was simply never proved.

Without going into further detail, this court simply notes that none of the alleged indiscretions of the Board, even if proved, would or could constitute a breach of the Agreement. The Board is not blameless in this case. The remedy for any problems the Board may have caused, however, was negotiation and reconciliation, not the "divorce" effected by Doctor Haughton.

The County continually argued before the court that the problems which developed at this health center were the result of more than just a personality conflict. However, after more than a week of testimony, this court is compelled to disagree. This entire dispute had its genesis in a personality conflict. The conduct of both parties is at best disappointing and at worst irresponsible, considering the fact that it is the provision of vital health care services to a needy community that has been severely compromised by their actions.

Plaintiff's exhibit 36a, which is the minutes of a meeting in Dr. Haughton's office before the "divorce" was declared,

reads in part:

> Ron [Shansky] then stated that it was clear that Coleman and Shiller had lost confidence in himself and possibly Mary Kuttner. He feels that the real issue is Ron and Mary Slim [Coleman] and Helen.

That quote is just a small indication of the personality conflicts which fill the entire record. This court does not want to force a particular composition of the Board. Board representation was never an issue this court considered particularly relevant to the greater issues involved at the hearing. Nor does the court wish to dictate which staffing the Center must have. It seems to be perfectly within the capabilities of both parties to be able to soften their positions on Board composition and Center staffing in order to reach a compromise.

Former Commission member Sybille Fritzche noted that the success of the whole Agreement was based on the parties working together. The parties evidenced an ability to work together at the beginning of the relationship. It was only when the Board proposed a health care program which was objectionable to certain staff members that the relationship started to deteriorate.

If the Board is unrealistic in its proposals, a less drastic remedy than trying to oust the old board in favor of a new board is available to both the staff and Dr. Haughton. Although the professional staff certainly is more informed medically as to what types of health care are feasible and effective, proposals by the Board represent attempts at solutions for special problems perceived in the community. Ideally, the Board's direct interaction with the community should put them in a position to recognize particular health needs. The needs should then be communicated to the professional staff for evaluation and discussion. If a proposal is not feasible, a reasoned compromise which ultimately benefits the users of the Center hopefully can be effected. Outright rejection of a proposal without

valid and properly explained reasons can only lead to the types of problems experienced by the Center.

So also, the Board must not expect the professional staff to blindly accept all of its proposals, as it is the staff's responsibility to provide the best medical service possible within a limited budget. The staff has a special expertise in this area which must be given great weight and its recommendations should be carefully considered by the Board.

The language of the Agreement provides a framework for accomplishing meaningful communication through the Liaison Committee. It should be utilized by both parties.

III. CONCLUSION

In summary, using the power vested in the court through the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, this court finds that the Agreement is a valid and enforceable contract, and that it was breached by the County. It further finds that the Board did not breach the Agreement. The parties may continue to utilize the services of the Community Relations Service, and report to the court their progress in resolving the remaining difficulties.

ENTER

_____

Stanley J. Roszkowski, Judge
United States District Court

Dated _____

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2226

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

v.

THE BOARD OF COMMISSIONERS OF COOK COUNTY and the COUNTY OF COOK,

Defendants-Appellants,

v.

PATRICIA ROBERTS HARRIS, in her capacity as Secretary of the Department of Health and Human Services,*

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-32—Stanley J. Roszkowski, *Judge.*

ARGUED JANUARY 9, 1981—DECIDED APRIL 21, 1981

Before PELL and WOOD, *Circuit Judges*, and BONSAL, *Senior District Judge.***

WOOD, *Circuit Judge.* This case involves the appeal of Cook County, Illinois and the Board of Commissioners of Cook County (referred to collectively as "Com-

* Referred to in this opinion under the former name of Department of Health, Education and Welfare.

** The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

missioners" or "County defendants") from the district court's adverse ruling on several contract claims that are part of a suit brought by the Uptown People's Community Health Services Board of Directors ("Board"). The suit presses federal and state pendent claims against the County defendants, and also names Patricia Harris in her capacity as Secretary of the U.S. Department of Health, Education and Welfare ("HEW") as a defendant in certain claims.[1] The district court decided only pendent claims. The County defendants contend as a threshold matter that the district court lacked pendent jurisdiction over the contract claims, and thus should not have ruled on them. We agree and therefore reverse and remand with instructions to dismiss the case.

I.

This case centers on an agreement between the Commissioners and the Board that helped establish a community out-patient health clinic in the Uptown area of Chicago. The idea for the clinic began in 1977, when a group of Uptown residents determined that the health care needs of the community required locally available out-patient care, which at the time was not obtainable. The residents consulted with the Commissioners,[2] who

[1] While Harris is the named federal defendant, the Complaint specifies no actions taken by her or on her behalf. The Complaint variously attributes the acts complained of to HEW as an entity and to unnamed representatives of HEW. The Commission cites cases suggesting that Harris could not be liable for monetary damages under 42 U.S.C. § 1983 as a participant with the state unless she played an affirmative role in the deprivation of the Board's rights. *See, e.g., Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971). The § 1983 issue is not dispositive of all claims pressed against Harris, and neither side to this controversy argued the extent to which declaratory or injunctive relief could be applied to Harris for the actions of HEW personnel. We need not and do not decide that issue.

[2] At the time, the Commission was called the Health and Hospitals Governing Commission. That entity was legislated out of existence in 1979, with the present defendant Com-

(Footnote continued on following page)

oversaw the delivery of health care services in Cook County hospitals and out-patient facilities. The Commission was not receptive to the idea of bearing the full burden of financial assistance to the clinic, although it indicated a willingness to help. It appeared that grant money and other assistance to operate the clinic might be forthcoming from the National Health Service Corps ("NHSC") and HEW. NHSC is a federal program that provides medical personnel and equipment to clinics such as the one involved here. Under NHSC regulations, the salaries of NHSC personnel provided to the clinic need not be reimbursed to the government if a community group rather than a state agency applies for the grant money. Hence, the interested residents of Uptown formed the Board.

An HEW official informed the Commissioners and the Board that in order for the Board to qualify for a grant the two Illinois parties would need to sign a cooperation agreement, which they did. HEW is not a signatory to that agreement. The agreement is the center of this litigation.

The portion of the agreement relevant to this appeal states that the Commission is to provide "start-up monies" and "its counsel in management and administration of the clinic until the point in time that the clinic has reached economic self-sufficiency and the [Board] requests complete independence from the Commission."[3] When "the ultimate goal" of economic self-sufficiency is reached "the Commission shall have the right to relinquish its authority in the operation of the clinic" to the Board. In addition, the agreement established a liaison committee to channel interaction

[2] *continued*
missioners assuming the former Commission's rights, duties and obligations. Ill. Rev. Stat. Ch. 34, § 5020, *as amended* P.A. 81-1197, § 10 (1979).

[3] The agreement defines "economic self-sufficiency" as a six-month period wherein the clinic's revenues exceed its operating costs by ten percent of the latter amount. The record shows that the clinic has not reached economic self-sufficiency.

between the Commission and the Board on matters of clinic policy.

The Board contends that the agreement grants it a property right: present participation in and future control of the clinic upon the attainment of economic self-sufficiency. The Board says that certain actions by HEW and the Commission constitute a breach either of that agreement or of general fiduciary obligations, damaging the Board's present right to participate in the clinic's operation and its expectancy interest in gaining control of the clinic. This litigation focuses not on the quality of health care at the clinic, but rather on who will be in charge of the clinic if it can survive its internal turmoil.

The relationship between the Commission and the Board began to falter soon after the clinic opened. During informal and formal meetings, the NHSC- and Commission-provided staff charged that the clinic was being used to further the campaign for alderperson conducted by a Board member, Helen Schiller. In particular, the staff alleged that non-medical support staff began to miss a great deal of worktime as election day neared. Election canvassing allegedly was going on at the clinic. The clinic's medical director testified that one of the Board members, Walter "Slim" Coleman, indicated that he was pleased that the clinic had conducted a mobile hypertension screening program in the community, since it gave Coleman the opportunity to leave campaign material in a building that otherwise was off limits because it was run by Schiller's opponent. And during the campaign, the clinic receptionists increasingly found that patients were demanding free medical care or instant attention without an appointment, all on the basis of statements allegedly made to them by Board members.

Other staff complaints centered around Board-appointed "patient-advocates" who allegedly manipulated the information on patient intake forms so that some patients would qualify for lower rates or free medical care under the clinic's sliding fee scale, when in fact the patients earned sufficient income to pay for

medical services at a higher rate. The staff also complained that the patient-advocates questioned the physicians' medical judgment within hearing of the patients. There was a general complaint that the patient-advocates acted as spies for a community political action group.

The staff expressed special concern over a Family Health Plan proposed by the Board. No one opposed the idea in the abstract, but the proposal set forth by the Board would entail extensive funding for expansion into new areas, which the staff felt was unwise given the shortage of staff and equipment in existing areas of clinic operation. Perhaps most disturbing to some was that the document setting forth the Plan appeared to be more a political polemic than a proposal for effective medical care. The document asserted that the Board represented "a community that is under attack" and "fighting for its survival." This required "an organized consumer base," a term that seemed ill-defined and not directly related to health care.

Tensions simmered, and eventually the executive director of the Commission announced the Commission's intention to "divorce" the Board and run the clinic on its own until a new community Board could be created or the present one reconstituted. The Board responded by charging that the Commission had failed to inform the Board of the depth of staff dissatisfaction. The Board concluded that the medical director had not handled staff complaints in the best way, and had actually exacerbated problems to put the Board in a bad light. Especially galling to the Board was the Commission's alleged failure to utilize the liaison committee provided for in the agreement as a way to foster co-operation. There also was concern that the medical director had undermined the Board's relationship with the clinic's grantors by presenting the Board in an unfavorable light to HEW and others.

As a result of the friction generated between the Board and the Commission, one potential grantor withdrew its approval of funds to implement the Family Health Plan described earlier. The NHSC personnel

eventually wrote to HEW stating that they would no longer continue with the clinic unless the Board was reconstituted. The Commission received a communication from HEW saying that HEW would support the Commission's attempts to create a new Board. HEW then held up payment of a grant to the Board, since it no longer recognized the Board as a grantee. The present litigation commenced.

II.

The Board filed a six-count complaint. Count One alleges in general terms that HEW violated statutes creating the NHSC program, unspecified regulations governing the administration of NHSC, and the terms of the NHSC grant. Count Two alleges that the Commissioners acted with HEW to deprive the Board "of its property without due process of law" in violation of the Fifth and Fourteenth Amendments to the federal Constitution and of the Civil Rights laws, namely 42 U.S.C. §§ 1983 and 1985(3).

Count Three alleges in general terms that the Commissioners breached their agreement with the Board, and is wholly a state claim. This is the Count on which the district court focused. Count Four alleges that the Commissioners have breached "their obligations of trust" to the Board, and that HEW participated in that breach.

Counts Five and Six allege breaches of Article I, § 10 of the United States Constitution (the Contract Clause) and Article I, § 2 of the Illinois Constitution.

The Complaint asks that the district court "[d]eclare that the agreement between the [Board] and the [Commissioners] is binding against all agencies like HEW . . . and that these agencies must honor their commitments to the [Board] and deal only with the [Board] with regard to the [clinic]." The Complaint also seeks unspecified monetary damages and an order enjoining the allegedly wrongful conduct described in the Complaint.

Both the County and federal defendants moved to dismiss or for summary judgment, raising jurisdictional

objections and legal defenses. The jurisdictional contentions asserted that there was no substantial federal claim to which the state claims could be pendent. The district court denied the motions, stating that the case was "not ripe for disposition" at that time.

Having failed to obtain a determination on the motion, federal defendant Harris submitted a motion to require a more definite statement. The motion articulated line by line through the Complaint what was needed to determine if a cause of action had been alleged. The district court granted the motion in full by ordering the Board to amend its Complaint by a specified date. The Board never complied with the district court's order. The Complaint remains on appeal as it stood at the time of the filing.[4]

The case proceeded to trial only on the state claim questions of whether the agreement was a contract and, if so, whether the County defendants unreasonably violated the contract. The federal defendant did not participate in this hearing on the state claims.

The district court concluded that the agreement constituted a contract and that the Commission breached its duties under the agreement. While it discussed the federal claims in terms of their jurisdictional significance, the district court did not render judgment on them. This case is before us pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and claims against federal defendant Harris remain before the district court.

III.

In a case that does not involve diversity of citizenship, a federal district court may exercise its discretion to consider state law claims only when they arise out of the same nucleus of operative fact that supports the court's

[4] The Board filed a detailed response to the Commission's motion for a more definite statement on the claims relating to the County defendants. The district court declared moot the Commission's motion on the basis of that response.

jurisdiction of a substantial federal claim, and the federal and state claims are such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). The district court in this case incorrectly concluded that it had pendent jurisdiction over the state claims. No substantial federal claims were alleged in the Complaint, so there was nothing to which the state claims could be pendent.

To begin with, the district court utilized an improper procedure to reach its determination on the substantiality of the federal claims. When the defendants asked the district court to determine as a preliminary matter whether it had jurisdiction of the Board's federal claims, the district court stated that the issue was not "ripe." But the issue of jurisdiction always is the threshold determination for a court, *Hagens v. Lavine*, 415 U.S. 528, 538-39 (1974), and may be especially important where, as here, the plaintiff who seeks to invoke federal jurisdiction alleges extensive state claims.

The proper procedure was followed in *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 409 F.Supp. 800 (D. P.R. 1975), where the court dealt with state contract claims and an allegation that the public telephone company had breached the private plaintiff's contractual rights without due process. The plaintiff's claims depended on state contract law, a determination that would have to be made in the exercise of pendent jurisdiction. The court in *Comtronics* concluded that it could not first determine the state law issues in a broad hearing, since "we need a jurisdictional basis *before* we can entertain the contractual state claim. We can not determine first if any contractual rights actually exist in order to then base jurisdiction on their unconstitutional deprivation." 409 F.Supp. at 811 (emphasis in original).

In the case before us, the district court should have made the initial determination on the pleadings, as did the court in *Comtronics*, whether or not a substantial federal question was alleged. *Gibbs, supra*, 383 U.S. at 727. The district court should not have put off consideration of the substantiality of the federal claims, hoping to

find the answer after a full trial on the state claims. Otherwise, the "considerations of judicial economy, convenience and fairness to litigants" that underlie pendent jurisdiction, *id.* at 726, are a nullity. In this case, the Commissioners were forced to trial on state claims when it was not clear that the court hearing the case had jurisdiction. The six-day trial on the contract claims might have resulted in the case being dismissed for lack of jurisdiction, a thorough waste of judicial resources. The district court should have determined at the outset, in a more limited proceeding, whether or not the Complaint alleges substantial federal questions so as to make pendent jurisdiction appropriate.[5]

Since the determination of whether or not jurisdiction exists is one of law to be determined from the pleadings, we may consider on this appeal whether the Board's allegations state a substantial federal claim. *Molina-Crespo v. Califano*, 583 F.2d 572 (1st Cir. 1978). Because even one substantial federal claim may be enough to support jurisdiction, we will consider whether the allegations against the state defendants and the federal defendant establish the district court's jurisdiction.

The State Defendants

The Complaint alleges the state's violation of 42 U.S.C. §§ 1983 and 1985(3), and the Contract Clause of the federal Constitution. The district court did not address the § 1985(3) or Contract Clause claims. Neither claim establishes federal jurisdiction.

It is settled that § 1985(3) requires that the alleged deprivation of rights be based on "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971); *Elbert v. Board of Education of Lanark*

[5] *Cf. Kimbrough v. Arkansas Activities Assoc.*, 574 F.2d 423 (8th Cir. 1978) (where district court disposed of case on non-federal grounds without addressing substantiality of federal claims at all, substantiality determination implied for purposes of appeal).

Community Unit, 630 F.2d 509 (7th Cir. 1980), *cert. denied*, ... U.S. ....., 49 U.S.L.W. 3725 (No. 80-1312 March 31, 1981). The Complaint does not remotely allege a class affected by the Commission's actions; indeed, it is only the *Board's* rights that are being asserted in this case. The Complaint does not state a claim under § 1985(3).

The federal Contract Clause is irrelevant to the jurisdiction question in this case, since it is pleaded in anticipation of a defense that the state law eliminating the former Health and Hospitals Governing Commission, *see* note 2, *supra*, also avoided or negated its obligations under the agreement at issue here. Such an allegation is not sufficient to establish federal jurisdiction. To the extent that the Contract Clause claim might be interpreted to allege a mere breach of contract, it does not raise a constitutional issue. *E & E Hauling, Inc. v. Forest Preserve Dist. of DuPage County*, 613 F.2d 675 (7th Cir. 1980).

The § 1983 claim is equally without merit. We view the pleadings on this contention with special care. As counsel for the Board candidly stated at oral argument, the case is one that turns solely on state law, and the Board seeks a trial in federal court because it believes it will receive a more sympathetic ear in this forum. Federal courts must be cautious when considering § 1983 claims to avoid results that imply that "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establish[es] a violation of the Fourteenth Amendment." *Paul v. Davis*, 424 U.S. 693, 699 (1976) (context of asserted liberty right to reputation). *See Meachum v. Fano*, 427 U.S. 215, 216 (1976) (not every "grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the due process clause"). We must be particularly wary of subjecting to federal judicial review the "wide spectrum of discretionary actions that traditionally have been the business of" state health care administrators rather than of federal courts. *See id.* at 224-25 (context of state prisoner's right to hearing before undergoing prison transfer).

The starting point for the analysis of the § 1983 claim is whether the agreement conferred on the Board a constitutionally protected right. *Holbrook v. Pitt*, No. 80-1006 (7th Cir. March 2, 1981) slip op. at 26. *See Morrissey v. Brewer*, 408 U.S. 471 (1972) (discussion in context of liberty interest). In its answer to the County's motion for a more definite statement of allegations, the Board explained that the right it asserted was a property interest in continued operation and potential future ownership of the clinic. This property right allegedly derived from the agreement that is at issue in this case.

State deprivations of property rights are cognizable under § 1983. *See Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). In *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court discussed the attributes of property rights in holding that employment contracts entered into by a state may confer on the employee interests that are protected under the Fourteenth Amendment from deprivation without procedural safeguards. The property interest in a state benefit, such as the one asserted here, attaches when a person has "more than an abstract need desire for it . . . [and] more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement." *Roth, supra*, 408 U.S. at 577. There must exist "rules or mutually explicit understandings that support his claim of entitlement." *Perry, supra*, 408 U.S. at 601, *citing Roth, supra*, 408 U.S. at 577.

The procedural protection of property afforded by the Fourteenth Amendment "is a safeguard of the interests that a person has already acquired in specific benefits." *Roth, supra*; 408 U.S. at 576. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 518-19 (1978). In order to state a claim cognizable under § 1983 based on a right to future ownership, the Board had to show that the agreement created an entitlement—understood to be such by both it and the Commissioners—to run the clinic upon its attainment of economic self-sufficiency. That it failed to do.

The agreement on its face creates no absolute right in the Board to obtain exclusive control of the clinic. The

introductory portions of the agreement recite the Commission's desire to foster local ambulatory health care in medically underserved areas, and the Board's desire to independently operate the clinic. This portion of the agreement also notes the Board's need of the large capital investment and management assistance necessary to operate the clinic. To this end the Commission agrees in Clause One of the agreement to provide money and "its counsel in management and administration of the clinic until the point in time that the clinic has reached economic self-sufficiency and the Uptown Community Board requests complete independence from the Commission." There follows a one-sentence definition of the meaning of "economic self-sufficiency." *See* note 3, *supra*. Then the agreement continues: "Thus, the Commission shall have the right to relinquish its authority in the operation of the clinic . . . upon the demand and tender of the Uptown Community Board" of the debts owed to the Commission, or the Commission's forgiving the debts.

The parties agree that these are the critical passages in the agreement. The Board, as noted, contends that the agreement gives it an absolute right to operate the clinic on its own upon the attainment of self-sufficiency and the repayment or forgiveness of the debts. The language of the agreement, however, cannot be made to bear that interpretation.

The Board must *request* independence from the Commission. It "[*t*]*hus*" becomes the Commission's "right to relinquish its authority." (Agreement Clause One, emphasis added.) There would be no need for the explicit requirement that the Board must request its independence if the Board had an automatic right to control when other conditions were met. Indeed, the only *right* that is set forth in regard to the Board's exclusive operation of the clinic is that of the Commission to relinquish its authority under the agreement. The Board may request that the Commission so exercise its right, but the plain terms of the agreement do not require that the Commission comply.

Other language in the agreement upon which the Board relies for its interpretation includes the introductory portion that relates the Commission's interest in having locally operated clinics and the Board's desire to independently run one. The district court also pointed to a provision of the agreement that states "the ultimate goal [of the agreement is] ownership and control by the [Board]." This language merely expresses the goal of the agreement's signatories. This expression of a goal and the desire to attain it does not, however, rise to the level of an explicit mutual expectancy that the Board is *entitled* to acquire the clinic for its exclusive use upon meeting the agreement's conditions. *Roth*, *supra*, 408 U.S. at 577. *Cf. Bishop v. Wood*, 426 U.S. 341 (1976) (no explicit guarantee of continued employment in contract or under state statutes). The parties obviously entered the agreement with the hope that things would work out, the same way as the teacher and the University in *Roth* presumably entered the employment contract in that case with similar high hopes. But an intent to have the agreement succeed does not confer a property right to force the Commission to act as though it *had* succeeded, especially here, where the agreement on its face leaves the ultimate decision to the Commission. This interpretation of the agreement would permit the Commission, even after the clinic was currently self-sufficient, to determine in keeping with its own public responsibilities that to assure continued self-sufficiency in the future and the proper delivery of health care that it should continue at least for some additional time to maintain a share of control. Some of the evidence concerning the conduct of the present Board suggests the wisdom of the drafters of the agreement in leaving a share of discretion with the Commission in spite of the original high expectations of all the parties.

The final provision of the agreement to which the Board turns for support states that the "Commission will maintain and help to facilitate the development of the clinic until economic self-sufficiency is achieved." This vests no additional right in the Board, although the Board claims that the provision shows a guarantee of future ownership. The quoted provision makes explicit

that the Commission's financial responsibility ends when the clinic is able to sustain itself, and is directed at assuring assistance for expenditures that may arise in the course of the clinic's operation but which may not be provided for in the agreement. The provision does not say that the Commission's operation of the clinic must cease at that time. The physical placement of the provision within the agreement makes clear that it relates to financial considerations: it follows several provisions that deal with the lease and purchase of the building that houses the clinic. The provision does not suggest a requirement that the Board receive full ownership upon request.

Since the plain language of the agreement taken as a whole assumes a clear, unambiguous meaning that the Board did not have a protectible property interest in future operation of the clinic, there was no need to go beyond the agreement's text in order to interpret its meaning. *Goldblatt Bros. v. Addison Green Meadows, Inc.*, 8 Ill. App. 3d 490, 290 N.E.2d 715 (1972). We note, however, that the evidence presented at the hearing in this case and relied upon by the district judge does not conflict with the plain language of the agreement. For example, the notes of one meeting of the principals reads that the clinic "will lease the center from the bank until the community buys the building," which is said to show that it was intended for the Board to eventually own the clinic. To begin with, everyone agrees that the parties intended that the relationship would succeed and the Board would own the clinic. As we have concluded, however, that general intent does not show that the agreement conferred a protectible property interest in future ownership for § 1983 purposes, since the Commission retained the right to make the ultimate decision. Moreover, since the agreement itself required that the Commission assist the Board to buy the building, the meeting's notes are merely cumulative of the language in the agreement, which we have already stated does not demonstrate the asserted property interest.

The minutes from another meeting indicate that the Commission felt a duty to teach the Board how to administer the clinic so that the Board would be ready to

operate the clinic "when it becomes necessary." This merely conforms to what we have said before: the goal and hope of the parties to the agreement was that the Board would one day be able to own the clinic, and administrative training was appropriate to that end. This is insufficient to create a property interest cognizable under § 1983, since the parties' "intent" did not amount to a requirement that the Commission turn the clinic over to the Board: discretion to do so was reserved exclusively in the Commission.[6]

The district court stated that testimony of certain former Commissioners shows "that it was always contemplated and intended" that the Board would own the clinic. Commissioner Ayala's testimony merely says that it was intended that "all the clinics will eventually end up to be self-sufficient." Since self-sufficiency only established the point at which the Board was entitled to request its independence, but did not mandate that the Commission grant independence, Commissioner Ayala's testimony does not prove the Board's point.

The portion of Commissioner Fritzsche's testimony to which our attention is directed simply states that there are mutual promises in the agreement. While her testimony may go to whether or not the Commissioner thought a contract existed, it says nothing about what the nature of those promises is, and her other testimony

[6] The Board asserts that a document prepared by the physician responsible for patient care at Cook County medical facilities shows that self-sufficiency was a realistic goal, soon-to-be realized. In fact, the document merely presents a general "perspective" on how to go about achieving self-sufficiency and specifically notes that the clinic is operating at a $400,000 annual deficit. Since testimony taken in this case indicates that none of the Commission clinics was ever self-supporting, there could be no reasonable expectation based on past County practice that the change in ownership would be automatic. *See Perry, supra*, 408 U.S. at 602-03. And the Board's assertion in its brief that it would not have undertaken the work necessary to start the clinic unless it expected eventually to own the clinic merely suggests a unilateral expectation on its part, insufficient for § 1983 purposes to show a protectible property interest. *See Roth, supra*, 408 U.S. at 577.

makes clear that she did not think that one of the promises involved the Board's asserted automatic right to ownership of the clinic.[7]

An entitlement may be created by the operation of state law as well as by the terms of the agreement. *See Bishop, supra*, 426 U.S. at 344. Principles of Illinois law provide no basis for the Board's claim to procedural protections. The agreement specifies no termination date other than the time of the Commission's acquiescence to the Board's request for independence upon the attainment of economic self-sufficiency. "It has long been the holding of the Illinois courts that when an executory contract fixes no time for its operation, it is terminable at the will of either party," and without notice. *Kraftco Corp. v. Koblus*, 1 Ill. App. 3d 635, 640, 274 N.E.2d 153 (1973). In *Steinberg v. Kepper-Nagel Real Estate Investments, Inc.*, 14 Ill. App. 3d 619, 303 N.E.2d 46 (1973), the court concluded that a real estate sales contract containing a termination date of 180 days after the lifting of an apartment rezoning moratorium at some unidentified future time did not state a definite time limit to the agreement. In the absence of such a time limit, the executory contract was terminable at will. *Id.* at 622, 303 N.E.2d at 48.

The present case involves a situation analogous to that in *Steinberg*. The Board's asserted future "property right" depends upon the attainment of a tenuous goal not within control of either party to the agreement, namely, economic self-sufficiency. That aspect of the agreement, wholly executory and standing alone, would be subject to termination at will and without notice by either party under Illinois law. The absence of a right to a hearing under state law or the terms of the agreement

[7] Commissioner Fritzsche testified that "the whole agreement is based on the hope that such an agreement . . . can work, and as soon as the working relationship no longer is possible, I think that then you must have powers to undertake steps to safeguard the operation of the clinic." The Commission has maintained funding for the clinic, which is continuing to provide medical care to the Uptown community.

is fatal to the claim for § 1983 purposes. *See Bishop, supra*, 426 U.S. at 344-45.

The case of *Maimon v. Telman*, 40 Ill. 2d 535, 240 N.E.2d 652 (1968), cited by the district court to support its contrary conclusion, is inapposite. The *Maimon* case dealt with the question of whether or not a joint venture existed between the parties to an agreement. If a joint venture was found to exist, the agreement would be held to remain in force until its purpose was accomplished or no longer possible. As the Court indicated, however, joint ventures present a virtually unique circumstance in that respect. In other situations, such as partnership, the agreement would be terminable at will. *Id.* at 538, 240 N.E.2d at 655. In the present case, aside from a single conclusory allegation in the Complaint, the record does not suggest that the Commission and the Board were joint venturers. Since the agreement thus was terminable at will and without notice, the Board had no right to procedural protections, cognizable under § 1983, to assert against the Commission's decision to "divorce" the Board.

There are no "rules or mutually explicit understandings" that support the Board's claim of entitlement to future ownership of the clinic. *See Perry, supra*, 408 U.S. at 601. Nor does state law provide that an agreement for such future ownership could not be terminated without notice. *See Bishop, supra*, 426 U.S. at 344-45. The portion of the agreement relating to future ownership of the clinic, then, did not confer a property right on the Board so as to create federal jurisdiction under § 1983.

The Board's response to the County defendants' motion for a more definite statement alleges the Board's property right in the "continued operation of" the clinic. In support of the existence of such a property right[8] the

[8] Neither the parties nor the district court directly addressed the possibility that the allegation regarding a right to "continued operation" provides a basis for § 1983 jurisdiction. The allegation was addressed, however, in connection with the

(Footnote continued on following page)

Board points to its responsibilities under the agreement for the clinic's billing and collection activities, and for participation on the liaison committee established to make "major policy decisions" regarding the clinic.

It is true that under the agreement, the "Board is responsible for all billing and collecting." The Commission, however, is to provide "assistance until the clinic develops the capability to do its own billing and collecting independently." Moreover, the agreement states that the Commission is to establish the accounting procedures to be used, and that the Board must implement those procedures. The portion of the agreement that deals with billing and collecting does not create a property right in the Board for jurisdiction purposes any more than does the portion related to future ownership. Until the clinic "develops the capability" to bill and collect on its own, the agreement is clear that the authority to do so resides for all practical purposes with the Commission. Evidence presented at the hearing on this point supports the plain language of the agreement. In particular, the record shows that the Board took no part in billing or collecting procedures, and that the Commission declined to allow it to do so when the Board requested responsibility in the area. The record does not indicate that the Board raised the issue with the liaison committee, as it might be expected to do on a matter such as this. The Board only submitted a questionnaire to the committee seeking an accounting and a report of billing to aid in "an understanding of accounts receivable." The practice of the parties thus reflects the scope of the Commission's authority set forth in the agreement.

The Board's authority to participate on the liaison committee likewise is insufficient to establish a property right for purposes of stating a federal claim. Both parties retained veto power over any decision made by the committee, but this was a significant limit only on the

[6] *continued*
issue of whether the agreement constituted a contract, and that discussion provides ample basis for our consideration of the jurisdiction issue.

Board's potential authority under the agreement. The agreement explicitly states that the Commission's authority over administration of the clinic derives from its exclusive responsibility to employ personnel to fill the highest positions in the clinic, as well as from its participation on the liaison committee. By contrast, the Board may exercise its administrative responsibilities *only* through its participation on the liaison committee, the decisions of which are, of course, subject to veto by the Commission. Thus, the agreement establishes that the Board's only viable interest in the operation of the clinic is what the Commission grants it by declining to veto liaison committee decisions. The Commission, on the other hand, retains authority to operate without input from the Board.

Whatever rights the agreement grants to the Board, they are not property rights cognizable under § 1983 as alleged in the Complaint.

The Federal Defendant

The district court has not yet dealt with the adequacy of the claims presented against federal defendant Harris. But pendent jurisdiction on the state claims against the County defendants could not be exercised absent a substantial federal question. In light of our conclusions on the federal claims against the County defendants we must address the allegations against Harris. The peculiar posture of this case thus makes it necessary to decide whether the Complaint states a substantial federal claim even though Harris is not a party to this appeal in the usual sense.[9]

Count One of the Complaint alleges that "HEW representatives have violated" unspecified statutes that created NHSC, "the regulations, rules and guidelines" HEW enacted to administer NHSC programs, and "the terms of the grant or assignment of NHSC personnel" to

[9] Defendant Harris submitted a brief in this appeal styled as a "Statement of Position." Government counsel presented Harris's position at oral argument.

the clinic. Counsel for Harris requested a more definite statement, contending that these vague and conclusory allegations fail to specify adequately the basis of the Board's complaint against HEW. The district court agreed and ordered the Board to respond by May 5, 1980 to each of the very specific requests for explanation presented by HEW. The Board is in default of that order, never having tendered a response.

The district court was correct in determining that the allegations were indefinite. While it is true that "notice pleading" is an integral part of the federal rules governing pleading, it still is necessary that *something* be stated that apprises a defendant of the substance of the allegations. *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *French v. Corrigan*, 432 F.2d 1211 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971); 2A MOORE'S FEDERAL PRACTICE ¶8.17 [4.-1]. If the simple statement that HEW violated unspecified regulations and statutes is sufficient to state a claim in this context, then virtually every complaint filed against the national government, however meritless, would confer jurisdiction over pendent claims, placing undue strain on the concept of federalism. This concern is especially significant in this case since even the extensive factual allegations in the Complaint do not shed light on which aspects of HEW's conduct relate to Count One, and which relate to fiduciary and other obligations allegedly breached under other Counts. Notice pleading still requires fair notice. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957). Count One is not sufficiently definite to state a substantial federal claim.

The allegations in Count Two that HEW violated the Board's right to due process under the Fifth Amendment and in concert with the Commissioners likewise fail to state an adequate claim. The Board is in default of the district court's order to more clearly state its claims against the federal defendant in this Count. Nevertheless, taking the Board's answer to the County defendants' request for a more definite statement on Count Two as treating the thrust of HEW's request, it is

clear that the allegations are inadequate. The property right alleged to exist in the agreement has no more substance when asserted against the federal defendant than when aimed at the Commissioners. Count Two fails to state a federal claim.

The vague allegation in Count Four that "HEW acting by and through its duly authorized agents and employees has participated in [the Commissioners'] breach of trust" is insufficiently definite to state a claim. The district judge so concluded when he directed the Board to amend its Complaint in response to Harris's motion to make more definite the allegations concerning the manner in which Harris participated in the alleged breach of trust and the specific basis of HEW's fiduciary obligations to the Board. The Board declined to comply with the district court's order. The Board's response to the County defendants' request for a more definite statement does not elucidate the nature of Harris's participation. The allegations that the Board thus places before us fail adequately to specify the acts of which the Board complains, and fail to state a claim upon which federal jurisdiction may be grounded.

IV.

The Complaint fails to allege a substantial federal claim. The district judge therefore had no jurisdiction to decide the Board's pendent claims. The district court did not consider whether the County defendants breached fiduciary duties owed to the Board in the absence of the asserted property interests. Even though some state claims were heard below, and it is our usual practice in that situation to reach the merits of the state claims, *see Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972), we decline to do so here where the record is inadequate to make a determination and the question has not been briefed on appeal. Accordingly, the district court's decision is reversed and remanded with directions to dismiss the Complaint without prejudice to the

Board's bringing the state claims alleged therein in state court, where they belong.[10]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[10] On February 26, 1981, the County defendants filed a motion to stay the district court's judgment. In light of our disposition of this case, we deny the motion as moot.

USCA 4969—Midwest Law Printing Co., Inc., Chicago—4-21-81—350

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

RECEIVED
JUN 06 1981
CHAPMAN AND ROYCE, LTD

May 29, 1981.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. DUDLEY B. BONSAL, Senior District Judge*

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois not-for-profit Corporation,
Plaintiff-Appellee,
No. 80-2226 vs.
THE BOARD OF COMMISSIONERS OF COOK COUNTY and the COUNTY OF COOK,
Defendants-Appellants,
vs.
PATRICIA ROBERTS HARRIS, in her capacity as Secretary of the Department of Health and Human Services,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80-C-32
Stanley J. Roszkowski, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by counsel for the plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

Opposition

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois Not-For-Profit Corporation,

Petitioner,

v.

RICHARD SCHWEIKER, in his official capacity as Secretary of the Department of Health and Human Services of the United States, and the BOARD OF COMMISSIONERS OF COOK COUNTY, and THE COUNTY OF COOK,

Respondents.

BRIEF OF THE BOARD OF COMMISSIONERS OF COOK COUNTY AND THE COUNTY OF COOK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD M. DALEY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-7940,
Attorney for Cook County Respondents.

JANE CLARK CASEY,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

JOHN A. DIENNER, III,
Assistant State's Attorney,
Of Counsel.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1.) Was the Court of Appeals correct in concluding that a District Court wholly lacks jurisdiction to decide pendent state claims where there is a total absence of well-pleaded federal claims?

2.) Does the lack of a factual record on various state claims justify the Court of Appeals' order that the case be dismissed without prejudice for refiling in state court?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I.	
The District Court Wholly Lacked Jurisdiction To Hear Pendent State Claims As There Was A Total Absence Of Well-Pleaded Federal Claims	5
A. The Federal Claims Against Defendant Harris Are Insubstantial	7
B. The Federal Claims Against The County Defendants Are Insubstantial	11
II.	
The Lack Of A Factual Record On The State Claims Justifies The Court Of Appeals' Order That The Case Be Dismissed Without Prejudice For Refiling In State Court	19
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

Board of Regents v. Roth, 408 U.S. 564 ..... 11, 12, 14
Broderick v. Assoc. Hospital Service of Philadelphia, 536 F.2d (3rd Cir. 1976) 6
Conley v. Gibson, 355 U.S. 41 (1957) 8
Goss v. Lopez, 419 U.S. 565 13
Griffin v. Breckenridge, 403 U.S. 88 (1971) 9
Huffman v. Pursue, 420 U.S. 592 (1975) 18
Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974) 6
In re Estate of Lightner, 81 Ill. App. 2d 263 (1967) 9
I.T.T. v. Vencap, Ltd., 519 F.2d 1001 (2nd Cir. 1975) 6
Judice v. Vail, 430 U.S. 327 (1977) 18
Kavit v. A. L. Stamm & Co., 491 F.2d 1176 (2nd Cir. 1974) 6
Lomax v. Armstrong Cork Co., 433 F.2d 1277 (5th Cir. 1970) 6
Paul v. Davis, 424 U.S. 693 (1976) 18
Perry v. Sinderman, 408 U.S. 593 ..... 11, 12
Stone v. Powell, 428 U.S. 465 (1976) 18
Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975) ... 6
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 3, 5, 6, 16, 17, 20
Wheeldin v. Wheeler, 373 U.S. 647 (1963) 18

Others

Illinois Constitution 1970, Art. I, §12 18
Ch. 34, §5020, Ill. Rev. Stat., as amended 1979 16

In The

Supreme Court of the United States

October Term, 1981

UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, an Illinois Not-For-Profit Corporation,

Petitioner,

v.

RICHARD SCHWEIKER, in his official capacity as Secretary of the Department of Health and Human Services of the United States, and the BOARD OF COMMISSIONERS OF COOK COUNTY, and THE COUNTY OF COOK,

Respondents.

BRIEF OF THE BOARD OF COMMISSIONERS OF COOK COUNTY AND THE COUNTY OF COOK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In early 1977 several residents of the Uptown Community in the City of Chicago became interested in opening an out-patient clinic. They approached officials of the Cook County Health and Hospitals Governing Commission in this regard. City of Chicago officials were opposed to the idea because of the presence of their comprehensive Board of Health Clinic in the immediate area. Nevertheless, when Commission personnel learned

that federal funds were available to defray some of the costs, they agreed to assist in the funding and opening of the clinic. H.E.W. regulations require the citizens to form a "community board" and sign a "cooperation agreement" between the Board and the Commission.[1]

The clinic eventually opened in late 1978, but dissention between the Board on the one hand and the County and clinic staff on the other soon reached such divisive proportions that the County "divorced" the Board and proceeded to run the clinic alone until a new Board could be created or the old Board reconstituted.

The Board filed the present action wherein it alleged that the defendants had violated a variety of its federally protected rights. The plaintiff appended to these purported federal claims several state contract claims. The Board sought declarative and injunctive relief as well as a forfeiture of certain County employee's salaries. Both the County and Federal defendants filed motions to dismiss or for summary judgment which attacked the sufficiency of the complaint on jurisdictional grounds. On March 27, 1980, the District Court held that the issue of the court's jurisdiction was not "ripe" for decision and therefore denied the motions.

Thereafter, a trial was held in which the Federal defendants did not participate and at which only a state breach of contract claim was addressed. On August 12, 1980, the District Court found the writing to be a contract, held that the County defendants had breached it, and enjoined the County defendants to recognize it as an enforceable contract. A F.R.C.P. 54(b) finding permitted the subsequent appeal.

---

[1] H.E.W. was not a signatory to that agreement which later became the focal point of the litigation.

The Court of Appeals for the Seventh Circuit conducted an exhaustive search for a viable federal claim. It found none. It concluded that "whatever rights the agreement grants to the Board, they are not property rights cognizable under [42 U.S.C.] §1983 as alleged in the complaint." The Court of Appeals found no well-pleaded federal claim against the Federal defendants and held,

> "The Complaint fails to allege a substantial federal claim. The district judge therefore had no jurisdiction to decide the Board's pendent claims." (App. 52)

The Board thereafter filed the present petition for a writ of certiorari. The clinic was closed in June, 1981 after the Cook County Board of Commissioners found it to be duplicative of the nearby Chicago Board of Health Clinic and a needless expenditure of tax monies.

SUMMARY OF ARGUMENT

The case of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) sets forth those situations which will permit a federal court to address state law claims. The federal claims must be substantial and they must predominate. They are neither in this case. The federal claims are insubstantial and should have succumbed to the motions to dismiss. The record clearly establishes that the state issues predominated at all stages before the trial court. The Board's decision not to comply with the district court's order to file a more definite statement in regard to its claim against the Federal defendants bespeaks its

indifference to these federal claims. Its insistence on a trial limited to the state claims with the state defendants demonstrates the substantiality of those claims. The District Court had no jurisdiction to address the state claims.

The Board considers the Court of Appeals' order that the case be dismissed without prejudice "to the Board's bringing the state claims alleged therein in state court where they belong," to be a "drastic departure from accepted and usual course of judicial proceedings." The Board relies upon a number of cases which indicate that where all issues have been joined and tried (i.e. both state and federal) then a Court of Appeals may review the state claim decisions even if it determines that no federal jurisdiction was present.

Such cases are patently inapposite for the reason cited by the Court of Appeals. Most state claims were never addressed below and there is therefore no factual record which could be reviewed by the Court of Appeals. There are allegations of state law breaches of trust by the federal defendants which were not heard as those defendants did not participate in the trial. State law claims of breaches of trust by the County defendants were also not addressed by the District Court. Count VI of the complaint was never considered. Hence, a new trial will be necessary in order to establish a factual basis for these claims. If there must be a new trial, the trial of these state claims should be in state court.

ARGUMENT

I.

THE DISTRICT COURT WHOLLY LACKED JURISDICTION TO HEAR PENDENT STATE CLAIMS AS THERE WAS A TOTAL ABSENCE OF WELL-PLEADED FEDERAL CLAIMS.

The threshold issue in this case is whether or not the District Court had jurisdiction, or the "power" to act when it entered its declaratory judgment finding the Agreement in question to be a contract. If the answer to that question is in the affirmative, this court must then determine whether or not the District Court properly exercised its discretion in hearing and ultimately deciding what was unquestionably only a state contract claim.

It is well established law that when a plaintiff has viable federal and state claims which arise from a common nucleus of operative facts and but for the federal/state dichotomy the plaintiff would be expected to litigate both claims together, then the federal courts have the power to hear and decide both claims. The premier case setting forth this policy of judicial economy and convenience is *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966). If, however, the plaintiff fails to properly plead a federal claim, then it is obvious that the District Court does not have jurisdiction to do anything but dismiss the complaint in its entirety.

The County defendants raised below and they assert again that the complaint failed to plead the requisite federal bases upon which it could append its state claims. It is not subject to reasonable debate that the

mere pleading of a spurious federal claim cannot magically create federal jurisdiction over an obvious state claim. To permit that to happen would be tantamount to sounding the death knell for the state court system. Federal jurisdiction could be triggered by the simple use of appropriate boilerplate, but meaningless, pleadings. There is no doubt that this court would not permit that to happen. There is also no doubt what a federal court would do when the plaintiff pleads a federal claim which is insufficient to get past a motion to dismiss. The complaint in its entirety would be dismissed. *See*, for example, *Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974), *Kavit v. A. L. Stamm & Co.*, 491 F.2d 1176 (2nd Cir. 1974), *Toensing v. Brown*, 528 F.2d 69 (9th Cir. 1975), *Broderick v. Assoc. Hospital Service of Philadelphia*, 536 F.2d 1 (3rd Cir. 1976), *I.T.T. v. Vencap, Ltd.*, 519 F.2d 1001 (2nd Cir. 1975) and *Lomax v. Armstrong Cork Co.*, 433 F.2d 1277 (5th Cir. 1970). This is essential in order to avoid the result of having "the dog wagged by his tail." *Kavit, supra* at 1180.

The *Gibbs* case held that,

> ". . . certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." [at p. 726]

Both the county and federal defendants filed motions to dismiss or for summary judgment. In the normal course of things, the ruling on the motions would decide the threshold "power" issue. Unfortunately, the District Court took the tack of denying the motions on "ripeness" grounds. That is to say the court refused to consider the merits of the jurisdictional defenses raised. This precluded the court from being able to make the required initial determination that a substantial federal question was raised.

Certainly when the District Court fails to determine at the outset whether or not the requisite federal basis exists, it cannot be said to have exercised its discretion to retain the pendent claims. That is precisely what happened in this case. The Court found itself addressing strictly state court issues. If the District Court had addressed the federal jurisdictional issues they would have been decided adversely to the plaintiff. Well established case law shows the plaintiff's federal claims to be meritless.

A. The Federal Claims Against Defendant Harris Are Insubstantial.

The plaintiff purported to make federal claims against both the County and federal defendants. The County asserts that all federal claims are meritless. Because of the peculiar progress of this case (with the federal defendants not participating), the County must urge not only its own grounds to dismiss but the federal defendant's as well.

Count I of the complaint states,

> "By its conduct, HEW representatives have violated the statutes which created the National Health Services Corps program, the regulations, rules and guidelines HEW agencies enacted for the administration of the NHSC programs and the terms of the grant or assignment of NHSC personnel to the Center."

To a lay person that might sound like the grossest sort of due process violations imaginable. To a court of law it is a set of empty phrases which does nothing to establish the existence of a federal claim. The plaintiff has utterly failed to state what defendant Harris has done or failed to do. Rather, the complaint makes it clear that she has not done or failed to do anything, to plaintiff's detriment.

Defendant Harris repeatedly attempted to impress upon the court the fact that HEW was not a signatory to the County/Board Agreement in question. It would seem fairly fundamental that she could not breach an agreement to which she was not a party. The plaintiff fails to set forth any act or omission by defendant Harris vis-a-vis the NHSC agreement which states a claim for relief. NHSC personnel were provided pursuant to the agreement. Both pa ties reserved the right to terminate the agreement for ny reason on thirty days' notice. Defendant Harris co ld not be enjoined to continue the NHSC agreement beyond its one year period as that would encroach on her discretionary authority and have the Court writing contracts between the parties.

There is, in fact, no relief to which the plaintiff could be entitled as against defendant Harris, whether it be legal or equitable in nature. The complaint does not allege a withdrawal of personnel who were supplied under the NHSC agreement. There is no case or controversy between the plaintiff and defendant Harris in regard to the County/Board Agreement in question and there is no federal claim satisfying Rule 8(a)(2) (requiring a short plain statement of the claim showing that the plaintiff is entitled to relief) against defendant Harris. The plaintiff's claim against defendant Harris in Count I should have been dismissed. *Conley v. Gibson*, 355 U.S. 41 (1957). It is also clear that the plaintiff sought to make defendant Harris liable for the acts of either her subordinates or the acts of the County defendants. That effort should have failed. Count I of the complaint utterly fails to state a claim upon which relief could be granted. The District Court erred in not granting defendant Harris' motion to dismiss that Count.

Equally frivolous were the allegations against defendant Harris in Count II. She is alleged therein to have deprived the plaintiff of property without due process of law in violation of 42 U.S.C. 1983 and 1985. Patently, no 1985 claim exists. The complaint must allege some class-based invidiously discriminatory animus to fall within the statute. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Neither section applies to federal officers acting pursuant to federal law.

Defendant Harris could not deprive the Board of any property rights under the County/Board Agreement as she has no role in that relationship. The Board has no property interest in the NHSC agreement because of the mutual right to terminate. Further, the complaint fails to allege that defendant Harris has, in any way, terminated or threatened to terminate the NHSC agreement. The Board has no legal relationship with defendant Harris except as may arise from that agreement.

The next Count involving defendant Harris is Count IV which alleges a breach of trust by HEW. One thing worthy of note is that the plaintiff freely interchanges "HEW" and "Patricia Harris." It is important to remember that only Patricia Harris was a party defendant; HEW was not. Yet the plaintiff repeatedly charges HEW with things such as "conspiring" with the County defendants' agents and breach of trust. The breach of trust issue does not state a claim for relief as plaintiff does not want the Agreement terminated (the remedy for breach of trust) but rather wants the Agreement enforced. See *In re Estate of Lightner*, 81 Ill. App. 2d 263 (1967).

The last part of the complaint which is relevant is the prayer for relief. This brings into focus the real nature of the claims made against the parties. If the plaintiff

claims a breach of trust but nevertheless seeks enforcement of the contract, then it is apparent that that Count has no legal basis for granting the sought-after relief. Similarly, paragraph one of the prayer seeks to have the court declare the County/Board Agreement to be binding on HEW (which is not a party to the Agreement or the lawsuit). Assuming for the sake of argument that the plaintiff seeks to have it be binding on defendant Harris instead of HEW it is apparent that no contract can be made binding upon someone not a party to it. The court could not grant the relief prayed for by the plaintiff. Paragraph two of the prayer seeks to have the court enjoin the "wrongful conduct described herein." The plaintiff has totally failed to plead any wrongful conduct by defendant Harris.

It is important to bear in mind that in addition to the plaintiff failing to plead any viable cause of action against defendant Harris, it did not choose to press any of these specious claims in the District Court. The County argued below that the plaintiff, in effect, waived its claims against defendant Harris. This was met with vociferous denunciations and denials by the plaintiff, but the simple fact remains that the plaintiff has never pursued its allegations against defendant Harris. The plaintiff may wish to parry with words, but the fact remains that for the twenty-one months that this case has been pending the plaintiff has neglected to adduce any facts to support the allegation that Patricia Harris deprived the plaintiff of its Fifth Amendment rights, violated the statutes creating the NHSC, the rules, regulations and guidelines of HEW, breached the NHSC grant or breached her duty of trust to the plaintiff. To the County's way of thinking, an allegation of gross deprivation of rights which is never carried to proof and for which no opportunity for trial has been requested is waived.

The record well demonstrates that these claims have been abandoned.

The County asserts that the plaintiff joined defendant Harris and the frivolous claims against her in order to gain entrée to the federal court system to litigate there a state contract case. The plaintiff can rail and bluster that the joinder was made for the purpose of asserting the federal claims but the record is ample testimony to the contrary. The Board's continuing failure to comply with the District Court's order to provide a more definite statement of its claim against defendant Harris further demonstrates its abandonment of the federal claims. Her joinder was a sham and fails to support jurisdiction under 28 U.S.C. 1331.

B. The Federal Claims Against The County Defendants Are Insubstantial.

Counts III, IV and VI are pendent state claims for relief. Count I relates only to HEW (defendant Harris). That leaves only Counts II and V within which there must be a viable federal claim or the District Court had no jurisdiction to proceed.

Count II is the property claim based upon 42 U.S.C. 1983 and 1985. As was pointed out in the previous section, there is not one fact to support a §1985 complaint. The §1983 claim required the District Court to find an unambiguous federally protected property right which has been violated.

After the trial the Court began analyzing the property claim for the first time by correctly citing the authority of *Board of Regents v. Roth*, 408 U.S. 564 and *Perry v. Sinderman*, 408 U.S. 593. The Court relied upon the following excerpts as controlling authority:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives; reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth* at 577.
>
> * * *
>
> ". . . 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . ." *Perry* at 601.

Thereafter, the Court's analysis broke down and it erroneously concluded that such a property interest existed.

The flaw in the District Court's analysis was premised upon its conclusion that

> ". . . a reasonable reading of the Agreement will show that the Board was entitled to eventual undisputed ownership of the Center . . ."

At the trial the County repeatedly pointed out what the Agreement plainly states. It specifically vests all administrative authority for the Clinic in the Governing

Commission. It specifically vests all medical authority in the Governing Commission. It further grants the Governing Commission absolute veto power over anything proposed by the Joint Liaison Committee, including its disbursement of the 1% retained income discussed in paragraph nine of the Agreement. The County proposed that the retention of all authority over the Clinic left nothing in which the plaintiff could claim a property interest. The plaintiff urged that its "right of ultimate ownership" of the Clinic after self-sufficiency is reached creates a sufficient interest. The District Court erroneously agreed. That decision was wrong for two reasons. The first is that the chance of self-sufficiency was, at best, a remote contingency. The second is that the allusions to self-sufficiency and possible Board ownership are non-contractual and unenforceable.

The genesis of plaintiff's purported property interest is the Agreement itself. Property interests are not created by the Constitution but by applicable local law. If local contract law does not provide a contract right of future ownership, then plaintiff has no property interest and no federal claim. *Goss v. Lopez*, 419 U.S. 565.

The Agreement makes absolutely certain by its own terms that no such *entitlement* to ownership exists. The first paragraph of the Agreement states that if self-sufficiency is ever reached,

> "The (Governing) Commission shall have the *right* to relinquish its authority in the operation in the Clinic."

For the District Court to find a "legitimate claim of entitlement" to ownership of the Clinic it had to find that the words "right to relinquish" are synonymous with "must relinquish." Because "right to relinquish" cannot mean anything other than a right to do so, if it wishes,

the plaintiff has only demonstrated an abstract need or desire for ultimate ownership. It therefore fails to meet the *Roth* test.

Nevertheless, the District Court found that this "right to relinquish" was no right at all but rather a duty to relinquish control. This conclusion was premised upon certain language in the Agreement. The District Court concluded, "that the Agreement itself suggests that the 'right' to relinquish control is another way of saying the Commission *will* relinquish control." For instance, the District Court found the following to be conclusive proof that the Governing Commission agreed that the Board was to be given future ownership of the Clinic.

> "Whereas, the Uptown Community Board *is desirous* of operating the Uptown People's Health Center . . . independently and *thus desires* to develop self-sufficiency in operations. . . . Agreement, page 1, ¶3 [emphasis added]
>
> . . . The [Board] and the Commission hereby agree to the operation of the [Center], with the *ultimate goal* being ownership and control by the [Board] Agreement, page 2, ¶2 [emphasis added]
>
> Whereas, the Commission *believes in* the concept of efficiently managed community owned and controlled ambulatory health care facilities . . ." Agreement, p. 2, ¶1 [emphasis added].

These excerpts are said by the Court to create a *contract obligation* on the Commission which runs to the benefit of the plaintiff. This conclusion is the most serious error committed by the District Court. The court below was somehow able to transform "desires" and "goals" into legal obligations. No amount of legal legerdemain is going to be enough to successfully transmute "wishes" into duties. The District Court may well have been correct in concluding that many par-

ticipants to this venture *hoped* that self-sufficiency might be possible. However, these expressions of hope and desire are manifestly precatory words which impose no duties and create no rights. This is made evident by the fact that neither party can demand self-sufficiency from the other. The County could not force the plaintiff to request independence after self-sufficiency is reached even though it "believes in" the concept of community owned facilities.[2]

The finding that a "goal" can be specifically enforceable is without precedent. That would be true whether or not this "goal" was set forth in a writing. The stating of a goal may well show the intent of the parties as is suggested by the District Court, but the goal does not and cannot create any property rights. The idea that a "hope" or "wish" creates "a legitimate claim of entitlement" is a notion that could readily appeal to a child before Christmas but it is not likely to appeal to This Court as a workable tenet of contract law.

Self-sufficiency may well have been the desire, goal or hope of the parties to this action. However interesting that might be historically, it is of absolutely no moment in establishing the presence or absence of a property right. The plaintiff's claim to future ownership of the Clinic is as ethereal as a springing future interest in property. The precatory language of the Agreement does

---

[2] Reasons that might make the plaintiff unwilling to request independence are: the plaintiff would have to supply all of the goods, services, manpower and expertise now being supplied at no direct cost or burden to the plaintiff; staffing is easier when the County need only transfer its own employees rather than have to recruit them from the outside; ready access to County Hospital, its specialty staff and equipment; access to County construction and maintenance department; access to County computers; etc.

not create a property interest in the Clinic. This being so, the plaintiff has no claim against the County under Count II of the Complaint.

The only other Count against the County is contained in Count V of the Complaint. That Count is entirely anticipatory in that it assumes that the County *may* raise as a defense to the other Counts the argument that the Agreement, even if a contract, was terminated by the enactment of the "take-over" statute (Ch. 34, §5020, as amended, Ill. Jev. Stat. 1979). The plaintiff cannot create original federal jurisdiction by the expediency of predicting (wrongly) that a defendant *might* raise a particular defense which would then give rise to a possible constitutional issue.

The *Gibbs* case held that if it appears that the state issues "substantially predominate," whether in terms of proof, of the scope of the issues raised, or the comprehensiveness of the remedies sought, the District Court should exercise its discretion to decline to hear the pendent claims. Ordinarily the question of whether or not the trial court has the *power* to hear the state claims is resolved on the pleadings. Unfortunately, in the case at bar, the District Court refused to come to grips with the issue of the presence or absence of a federal claim as raised by the motion to dismiss. Despite that procedural error the trial court was continually obligated to be vigilant to the predominance of state issues.

In this case it was absolutely clear at the pre-trial stage, the trial stage, and the post-trial stage that the state issues did not just "substantially predominate," they "*exclusively* predominated." *Gibbs* held,

> "The issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or

> even the trial itself may reveal a substantial hegemony of state law claims . . . which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, *dismissal of the state claims might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may be fairly dismissed." Gibbs* at 727. [Emphasis added.]

Here we have the situation where there never was any viable federal case. We have a case where, if the motions to dismiss had been ruled upon, they would have been granted based upon well settled federal law. That being the case, the District Court never had the *power* to decide the state issues. It was, in fact, without jurisidction to proceed with either the federal or the state claims. Even assuming, *arguendo*, that the federal claims were valid, they were clearly ancillary to or an appendage of the state claims which predominated at every stage of the proceeding. That being the case, the District Court should have exercised its discretion to dismiss the state claims without prejudice.

The Petitioner now attempts to side-step these controlling issues by raising a specious issue for the first time in its Petition for Writ of Certiorari. It asserts that relegation of its claims to state court will work a hardship on it. While never having raised the issue in the trial or appellate courts, the Board now proposes

that it might be left with no remedy against the federal defendants if it must litigate in state court.

The first response to the Petitioner's claim that it has no clear remedy against the federal defendants in state court is that it has no claim whether or not there is a remedy. As the Seventh Circuit pointed out, the Petitioner neglected to comply with the District Court's order to proffer a more particular statement of its claim. The Petitioner has ignored that Court order for nearly two years. At this point in time, the plaintiff has clearly waived its claims against the federal defendants.

The Petitioner observes that some state courts have foregone the right to entertain injunctive actions against federal defendants, but Illinois is conspicuously missing from that string of citations. The fact of ultimate review by This Court over any such case coupled with a similar recognition of a state court's duty and ability to deal with federal issues (*Stone v. Powell*, 428 U.S. 465 (1976); *Judice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue*, 420 U.S. 592 (1975)) presage such cases.

The Petitioner's argument that federal jurisdiction must exist because state court jurisdiction might not is defeated by a case relied upon by the Board in its brief. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963) raised the same argument. It was rejected by this Court. The Petitioner stated that federal jurisdiction must exist for all imagined wrongs. That proposition has been rejected any number of times by this Court. See, *Paul v. Davis*, 424 U.S. 693 (1976). Rather, it is the Illinois Constitution which states that there shall be a remedy for all injuries and wrongs, (Art. I, §12), not the U.S. Constitution.

Lastly, the complaint is clearly so deficient on its face that it fails to state any claim against Patricia Harris,

the original federal defendant. She was not alleged to have participated in any acts or omissions and is not alleged to have known of any of the facts recited in the complaint. In its present form the complaint fails to state a claim upon which relief could be granted in state or federal court.

II.

THE LACK OF A FACTUAL RECORD ON THE STATE CLAIMS JUSTIFIES THE COURT OF APPEALS' ORDER THAT THE CASE BE DISMISSED WITHOUT PREJUDICE FOR REFILING IN STATE COURT.

The procedural history of this case leaves us with the worst possible outcome. There were no viable federal claims, the state issues predominated at all stages of the litigation and the case, nonetheless, went to trial and the court ruled on a state issue alone. It is certainly tempting to shrug one's judicial shoulders and say that a serious mistake was made but there is no sense in relitigating some of the same issues again on remand to state court. That conclusion, however, would constitute an egregious abandonment of this Court's duties. Compounding an error does not solve an awkward problem.

It cannot be said that the trial court exercised its discretion to hear the pendent claims. There is nothing in the record to indicate that an evaluation of the threshold issues ever took place. The problem is to decide what should happen at this juncture. The Seventh Circuit ruled that the District Court must dismiss the state claims. To do otherwise would create a species of judicial acts and the supposed exercise of discretion which would be exempt from review simply because the District Court continued with the case after making an erroneous ruling.

The case of *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3rd Cir. 1976) addressed this problem of a completed trial.

> "Notwithstanding the already substantial time devoted to the case and the expense incurred by the parties, we do not believe that the considerations of 'judicial economy, convenience, and fairness to litigants' dictates that the pendent claims be entertained. It is indeed unfortunate that the case has progressed to the appellate level following a trial by the district court when it should have been dismissed on the pleadings. . . . Were we to sustain the district court's exercise of pendent jurisdiction merely because of the time already invested in litigating the state claims, we would be insulating from review a significant class of cases solely because an alleged error had perpetuated through the trial process. *The needless expenditure of time and energy occasioned in the first instance by the improper exercise of pendent jurisdiction would thus become the justification for allowing the incorrect ruling to stand.*" [Emphasis added.]

The present state of affairs is certainly not the fault of the defendants as they asserted their jurisdictional defenses from the outset of this lawsuit.

This Court held in *Gibbs* that the decision of state claims should be left to the state courts when there are either no substantial federal issues or that the state issues predominate. This is so in order that the ruling have a "surer footing." No more compelling a reason need be offered to support the dismissal order.

The Court of Appeals was correct in stating that the District Court seriously erred by not first addressing the jurisdictional issue. It must be the threshold issue, *Hogens v. Lavine*, 415 U.S. 528 (1974):

> "Otherwise, the 'considerations of judicial economy, convenience and fairness to litigants' that underlie pendent jurisdiction [*Gibbs* at 726] *are a nullity.* In this case, the Commissioners were forced to a trial on state claims when it was not clear that the court hearing the case had jurisdiction." (App. 40) (emphasis added).

The District Court has caused great cost and inconvenience to the parties to this action but that, in itself, is poor justification for holding the new trial on the merits of the various state claims in federal court. It is, in fact, no justification at all.

Only one state issue was addressed below. Three state issues have yet to be tried. As a new trial is necessary in any event, that trial should be in state court where it belonged in the first instance.

CONCLUSION

The well settled case law makes clear beyond doubt that there was never any substantial federal questions before the District Court. If the Court had addressed the motions to dismiss they would have been granted. It is inconceivable how the jurisdictional issues could not have been "ripe" for adjudication. The complaint was on file and it either stated a federal claim or it did not. No factual development is necessary to determine whether or not a complaint states a claim upon which relief may be granted. It is patent on the face of the pleadings. The trial court's extraordinary handling of the motions to dismiss frustrated the parties' legitimate interest in

ascertaining the presence or absence of jurisdiction or the power of the court to act.

Jurisdictional bars to the consideration of a case are of more than passing interest. A decision rendered by a court without subject matter jurisdiction is a nullity. The declaratory judgment entered by the trial court was also a nullity. It had no *power* to act. If it had no power to act, This Court may not accept its holdings, whether it be for judicial economy or convenience. Convenience plays no role when there was no authority to act in the first instance.

The sole federal issue raised by the Plaintiff was the alleged denial of a purported property claim. Application of established law to the claim as pleaded commanded the dismissal of that Count. No legitimate claim of entitlement can be premised upon the "hopes," "desires," or "wishes" of the parties. *Roth*, *supra*, states that the parties must have more than an "abstract need or *desire*" for it. The trial court based its decision on the stated *desire* of the Plaintiff to operate and own the clinic (Agreement, page 1, par. 3). Only a flight of fancy could create a contract obligation out of such precatory language.

Assuming, *arguendo*, that "desires" and "beliefs" can be the foundation for a property claim, the District Court erred in not dismissing the state pendent claims inasmuch as they exclusively predominated at every stage of these proceedings. *Gibbs* warns that the trial courts are not to tolerate a litigant's effort to impose upon it that which is only a state court case.

> "Once it appears that the state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may be fairly dismissed." (at 727)

In this case the federal claims are so insubstantial, if not clearly frivolous, as to justify the Court of Appeals' decision to order that the case be dismissed.

It is clear from the nearly two year history of this case and the record that the Plaintiff has never asserted his federal claims against either the federal or the county Defendants. This record amply bespeaks a case where the Plaintiff was well aware of the nature of his proofs and the relative importance of his claims—that is, strictly state oriented. The Plaintiff's efforts to foist its state claims upon the federal courts must fail if the federal court system is to be spared the obligation of becoming the new Chancery Division of the Circuit Court of Cook County.

These Respondents urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD M. DALEY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-7940,
Attorney for Cook County Respondents.

JANE CLARK CASEY,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

JOHN A. DIENNER, III,
Assistant State's Attorney,
Of Counsel.